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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

ROBERT E. NETZLEY,

Petitioner,

vs.

JAMES P. CELEBREZZE, ET AL.,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Ohio Supreme Court

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September 17, 1990

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Counsel for Petitioner

September 17, 1990

QUESTIONS PRESENTED

1. WHETHER THE SCOPE OF PROTECTION UNDER THE FIRST AMENDMENT FOR FREEDOM OF SPEECH ENCOMPASSES THE RIGHT OF A DEFENDANT IN A LIBEL ACTION, TO HAVE THE COURT DETERMINE WHETHER THE ALLEGED LIBELOUS STATEMENTS ARE OF A TYPE WHICH PROVIDE A BASIS FOR SUCH AN ACTION?

2. DOES THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION PROVIDE FOR ABSOLUTE IMMUNITY FROM SUIT FOR DEFAMATION WHERE THE TYPE OF SPEECH IN QUESTION IS THE EPITHET "MAFIA FAMILY," USED IN A PARTISAN POLITICAL CAMPAIGN PAMPHLET TO DESCRIBE THE SITUATION EXISTING IN THE OHIO SUPREME COURT DURING A CAMPAIGN FOR THE ELECTION OF ASSOCIATE JUSTICES?

3. WHETHER THE OHIO SUPREME COURT'S DETERMINATION THAT THE TRIAL COURT'S DENIAL OF THE PETITIONER'S MOTION FOR SUMMARY JUDGMENT IN THIS LIBEL ACTION IS NOT A FINAL APPEALABLE ORDER UNDER OHIO REVISED CODE §2505.02 UNCONSTITUTIONALLY DEPRIVED THE PETITIONER HIS RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

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PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 14.1(b), petitioner Robert E. Netzley states that the following individuals and/or corporations were parties to the proceeding in the Ohio Supreme Court:

Miami County Republican Committee;
James P. Celebrezze;

There were no other parties to the Ohio Supreme Court proceeding. James P. Celebrezze and the Miami County Republican Committee are the respondents herein.

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PETITION FOR WRIT OF CERTIORARI

To the Ohio Supreme Court

Petitioner, Robert E. Netzley ("Netzley"), respectfully prays that a writ of certiorari issue to review the decision and order of the Ohio Supreme Court filed in these proceedings on May 16, 1990, and July 3, 1990.

OPINIONS BELOW

This petition seeks review of a judgment of the Ohio Supreme Court that conflicts with decisions of this Court on the issue of whether the First Amendment to the United States Constitution provides for immunity from suit as well as from liability for expressions of opinion made in the context of a political campaign. The petitioner also seeks review of whether the Ohio Supreme Court's holding that the trial court's denial of his summary judgment motion was not a final appealable order denied him his constitutional right to due process and whether a denial of such summary judgment motions are immediately appealable because the First Amendment guarantees immunity from suit for statements which provide no basis for libel actions.

The decision and order of the Ohio Supreme Court in Celebrezze v. Netzley are reported at 51 Ohio St.3d 89, 554 N.E.2d 1292 (1990), and are reproduced in the appendix at pp. A-2 to A-14. The Ohio Supreme Court's order denying the petitioner's motion for rehearing is reported at 52 Ohio St.3d 710, and is reproduced in the appendix at pp. A-1. The Eighth District Court of Appeals' unreported decision is reproduced in the

appendix at pp. A-15 to A-54. The judgment and opinion of the Cuyahoga County Common Pleas Court denying the petitioner's motion for summary judgment is also unreported and appears in the appendix at pp. A-55 to A-79.

JURISDICTION

The decision of the Ohio Supreme Court was entered on May 16, 1990. The petitioner filed a timely motion for rehearing. The motion for rehearing was denied on July 3, 1990. This petition is timely filed within the time period provided by 28 U.S.C. §2101(c) and Supreme Court Rules 13.1 and 13.4. This Court's jurisdiction is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The constitutional provisions involved are the First and Fourteenth Amendments to the U.S. Constitution. The statute involved is Ohio Rev. Code Ann. §2505.02 (Baldwin 1987). They appear in the Appendix at pp. A-80 to A-82.[1]

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[1] Pursuant to U.S. Sup. Ct. R. 29.4(c), since the constitutionality of Ohio Rev. Code §2505.02 is being drawn into question, as applied, 28 U.S.C. §2403(b) may be applicable.

STATEMENT OF THE CASE

A. Statement of the Facts

Respondent James P. Celebrezze ("Celebrezze") filed this action for libel, "false-light" invasion of privacy, and intentional infliction of emotional distress against petitioner Robert E. Netzley ("Netzley"), the Miami County Republican Committee ("Committee"), The Plain Dealer Publishing Co. ("Plain Dealer"), and Mary Anne Sharkey ("Sharkey").

Celebrezze filed the action as a result of the publication of a political campaign pamphlet authored by Netzley and distributed by the Committee, and as a result of the publication of two newspaper articles authored by Sharkey and distributed by The Plain Dealer.

Respondent Celebrezze, a Democrat, was an Associate Justice of the Ohio Supreme Court from January 1983 through December 1984. In 1984, he ran for re-election against Judge Craig W. Wright, ("Wright"), a Republican. The campaign generated considerable political debate, controversy and publicity.

At that time, Celebrezze's brother, Frank D. Celebrezze ("F. Celebrezze") was the Chief Justice of the Court, and Anthony J.

Celebrezze, Jr. ("A. Celebrezze") was Ohio's Attorney General. The administration of the Ohio Supreme Court under F. Celebrezze had drawn considerable criticism from the media, the Ohio State Bar Association ("Bar Association"), legislators, judges, and others. Those criticizing the cronyism and operating tactics of the F. Celebrezze administration often likened the Court to a "Mafia-type Family," and used terms consistent with the metaphor.

Petitioner Netzley, a Republican, served in the Ohio House of Representatives for over 25 years. He also chaired the Miami County Republican Committee.

Netzley prepared a campaign pamphlet for the November 6, 1984, general election on behalf of the Committee. The campaign pamphlet endorsed Republican candidates running for national, state and local offices. The Committee distributed the pamphlet only to registered voters of Miami County.

One of the six columns in the political pamphlet contained statements from the editorial page of the Dayton Daily News of October 7, 1984, about Supreme Court candidates Douglas and Wright, as well as comments concerning the Celebrezze Court and its administration. The pamphlet quoted the Dayton Daily

News' characterization of Judge Douglas as fair, energetic and brilliant, and of Judge Wright as brilliant. The other columns contained opinions concerning other candidates and a sample ballot.

The commentary on the Supreme Court used the same metaphor and tone that had been repeatedly used to criticized the Celebrezze Court and its administration. The campaign pamphlet quoted the Dayton Daily News' opinion of the Supreme Court under F. Celebrezze "and his cronies" as being "the crudest, most partisan, most vindictive in memory, and the most dangerous. ..." The pamphlet urged the people to "**JUDGE THE COURT**" and included the commentary complained of:

> It's no wonder that some are calling Ohio's Justice System the '**MAFIA FAMILY**' Court. Take a look. **Frank Celebrezze**, Chief Justice, Brother **Jimmy Celebrezze**, Associate Justice, Cousin **Tony Celebrezze**, Ohio Attorney General, and **Frank Celebrezze's** "Crony," **Angelo Gagliardi** [sic], intimidator in charge of the Ohio Disciplinary Council [sic].
>
> **ONLY THE VOTERS OF OHIO CAN STOP THEM**
>
> **VOTE DOUGLAS and WRIGHT**

The campaign pamphlet does not contain any specifics suggesting criminal activity or association of any sort.[2]

B. Trial Court Proceedings

The trial court dismissed Celebrezze's "false-light" invasion of privacy claim. In October of 1986, Netzley, the Committee, and The Plain Dealer, along with Sharkey, filed separate motions for summary judgment on the remaining two claims in the Court of Common Pleas of Cuyahoga County. Netzley argued that the pamphlet contained expressions of opinion absolutely protected under the First Amendment. The trial court granted the motion filed by The Plain Dealer and Sharkey, but denied the motions filed by Netzley and the Committee. The trial court concluded that its findings constituted final judgments for each defendant.

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[2] The entire pamphlet is attached as Exhibit A to the Opinion and Order of the Eighth District Court of Appeals and appears in the Appendix at pp. A-51 to A-52.

C. Eighth District Court Of Appeals Proceedings

Petitioner Netzley and the Committee appealed from the denial of their motions for summary judgment arguing that absolute constitutional immunity was provided under the First Amendment to expressions of opinion. Celebrezze cross-appealed from the trial court's order granting the motion filed by The Plain Dealer and Sharkey. The cases were consolidated.

The Court of Appeals for the Eighth Appellate District held that the trial court's order denying the motions filed by Netzley and the Committee was a final order pursuant to Ohio Rev. Code §2505.02 because the order affected a substantial right made in a special proceeding. After analyzing the political pamphlet under the test set forth in Scott v. News-Herald, 25 Ohio St.3d 243, 496 N.E.2d 699 (1986), and Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984), cert. denied, 471 U.S. 1127 (1985), the Court of Appeals held that the publications were non-actionable expressions of opinion. The Court of Appeals reversed the trial court's denial of the motions filed by Netzley and the Committee, rendered judgment in their favor, and affirmed the trial court's grant of the motion filed by The Plain Dealer and Sharkey.

D. Ohio Supreme Court Proceedings

Celebrezze filed a notice of appeal from the August 15, 1988 judgment of the Eighth District Court of Appeals, which constituted a motion to certify the record pursuant to Rule II, Section 2 of the Rules of Practice of the Ohio Supreme Court. The Ohio Supreme Court denied the motion with respect to The Plain Dealer and Sharkey, but granted the motion with respect to petitioner Netzley and the Committee.

On May 16, 1990, the Ohio Supreme Court reversed the judgment of the Eighth District Court of Appeals and remanded the case to the trial court for further proceedings consistent with its opinion. The Ohio Supreme Court held that the "denial of the petitioner's motion for summary judgment was not made in a special proceeding and was not otherwise a final appealable order." 51 Ohio St.3d at 93. Thus, the Ohio Supreme Court found that the Eighth District Court of Appeals had no jurisdiction to hear the appeal. The Ohio Supreme Court based its decision on the ground that the immunity accorded by the First Amendment provided immunity from liability, but not immunity from suit. Id. at 92.

The petitioner filed a motion for rehearing on May 29, 1990, on grounds that the Ohio Supreme Court's decision turned upon an issue neither raised by the respondents, nor briefed by the petitioner. Respondent Celebrezze never briefed or argued that the First Amendment to the United States Constitution affords expressions of opinion immunity from liability only, yet does not provide such expressions for immunity from suit. Consequently, prior to his motion for rehearing, petitioner Netzley never had the opportunity to brief or argue the immunity guaranteed under the First Amendment is an immunity from suit.[3]

The Ohio Supreme Court denied the petitioner's motion for a rehearing.

WHY THE WRIT SHOULD BE GRANTED

1. The Supreme Court Has Never Determined Whether The Scope Of Protection Under The First Amendment For Freedom Of Speech

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[3] Petitioner Netzley specifically raised the issue that construing Ohio Revised Code §2505.02 to hold a denial of a defendant's motion for summary judgment in a libel action an interlocutory order unconstitutionally deprives the defendant of their rights to due process in his brief to the Ohio Supreme Court and in his motion for rehearing. The Ohio Supreme Court did not address this issue.

Encompasses The Right Of A Defendant In A Libel Action To Have The Court Determine Whether The Alleged Defamatory Statements Made Are Of A Type Which Provide A Basis For Such Action.

The First Amendment affords full constitutional protection from libel actions for statements made concerning public figures on matters of public concern if the statements are not provable as false, or if they cannot reasonably be interpreted as stating actual facts about the public figure involved. Milkovich v. Lorain Journal Co., _____ U.S. _____, 111 L. Ed.2d 1, 16-18 (1990). Such statements are not actionable as a matter of constitutional law because they provide no basis for libel actions. Id. at 16. "Full constitutional protection" necessarily encompasses the right of a defendant in such actions to have the court determine, in a summary proceeding, whether the alleged defamatory statement are of the type deemed actionable. Consequently, "full constitutional protection" also encompasses the right of a defendant to an immediate appeal if a trial court denies his summary judgment motion.

This principle is an implicit part of the Supreme Court's decisions concerning the First Amendment and political speech,

but has yet to be articulated in the First Amendment context. The protection guaranteed is that the defendant is immune from suit, as well as liability, if the statements are of the type which are not actionable. The Ohio Supreme Court's decision effectively mandates that a defendant's right under the First Amendment must be resolved at trial. That decision is contrary to the fundamental principle of the First Amendment which protects the free flow of ideas and prevents restraints upon public, and especially political, speech.

a. The Distinction Between Immunity From Suit And Immunity From Liability Has Been Defined By This Court In Context Of Constitutional Freedoms Less Fundamental Than The Right To Freedom Of Expression.

This Court has determined that an order denying a claim of qualified immunity is immediately appealable because it is an entitlement not to stand trial under certain circumstances, and is an immunity from suit and not liability. Mitchell v. Forsyth, 472 U.S. 511,526 (1985). "The immunity is effectively lost if a case is erroneously permitted to go to trial." Id. The underlying reasoning for allowing an immediate appeal is that the Court's

decision is effectively unreviewable on appeal from a final judgment. Id. at 527. See, also, Smith v. McDonald, 737 F.2d 427 (4th Cir. 1984), aff'd, 471 U.S. 1127 (1985) (An order denying a claim of absolute privilege under the First Amendment right to petition is immediately appealable in a libel action).

This Court has also held that orders denying summary judgment motions which assert absolute immunity defenses are immediately appealable under the Collateral Order Doctrine. See, e.g., Nixon v. Fitzgerald, 457 U.S. 731 (1982).

This Court has consistently held that certain types of statements are not actionable if they are not provably false or cannot be reasonably interpreted as stating actual facts about the public figure involved. Milkovich, at 16-18. Since certain types of statements are not actionable, a defendant in a libel action has the right under the First Amendment to have this issue resolved prior to trial. Thus, similar to the absolute and qualified immunity cases discussed above, immediate appellate review of these issues is necessary or the substance of the constitutional protection is lost. Deferring the resolution of whether or not the statements made are actionable, until after trial, defeats the nature of the constitutional protection. Immunity from liability and the pre-

clusion of recovery for statements which are not actionable necessarily includes immunity from suit as well. This prevents the chilling effect the threat and the burden such litigation has on political speech, and is consistent with the fundamental principles of the First Amendment.

Numerous courts have recognized that summary procedures are essential to preserve the constitutional protection guaranteed by the First Amendment. See, Meridian Star, Inc. v. Williams, 549 So.2d 1332 (Miss. 1989); Immuno A.G. v. Moor-Jankowski, 145 A.2d 114, 537 N.Y.S. 2d 129, aff'd, 74 N.Y. 2d 548, (1989), Judgment vacated, _____ U.S. _____, 110 S.Ct. 3266 (1990); Washington Post Co. v. Keogh, 365 F.2d 965 (C.A.D.C. 1966), cert. denied, 385 U.S. 1011 (1967). This is because:

> One of the purposes ... is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government. The threat of being put to the defense of a lawsuit brought by a popular public official may as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself *** unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. ...

Washington Post, at 968.[4]

The Ohio Supreme Court decision in the instant case creates an anomalous situation: public officials are entitled to have their claims for immunity from suit determined prior to trial, while the private citizen accused of committing libel against that public official must wait until trial to resolve his claim that the statements made provide no basis for the libel action. Which right in question is more basic under the constitution? The core of the First Amendment is the recognition of the fundamental principle of the free flow of ideas and opinions on matters of public interest and concern. Hustler Magazine v. Falwell, 485 U.S. 46,50 (1988). The opportunity for free political discussion is a fun-

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[4] The state cases cited above both held that the alleged defamatory statements made were not actionable under the First Amendment because they were expressions of opinion. In light of Milkovich, discussed infra, the continuing validity of these holdings is questionable. However, Milkovich expressly indicates that certain types of statements provide no basis for recovery in a libel or defamation action, and are not actionable. Thus, a defendant's right in a libel action to have the court determine by way of summary proceeding whether the alleged defamatory statements are of an actionable type is still a viable issue, and has yet to be articulated by this Court. The Ohio Supreme Court determination that the First Amendment only guarantees immunity from liability, holds that a defendant has no such right.

damental principal of our constitutional system. New York Times v. Sullivan. 376 U.S. 254 (1964).

The rights guaranteed to a defendant in a libel action against a public official are clearly paramount to the rights guaranteed to the public official in question to be immune from certain conduct. "One of the prerogatives of American citizenship is the right to criticize men and measures." Falwell, 45 U.S. at 51 (citation omitted). The First Amendment rights in question are the foundation upon which this country was built. The right of the public to criticize their elected officials is the most fundamental freedom that the First Amendment freedom of speech clause was intended to protect.

In New York Times and its progeny, this Court has consistently held that certain types of statements provide no basis for libel or defamation actions and are guaranteed "full constitutional protection" under the First Amendment. Milkovich, at 16-18. Implicit in the Court's holdings that these statements are not actionable is that the defendant in such actions has the right to have the court determine, in a pretrial summary proceeding, whether the alleged defamatory statements made are of a type which can provide a basis for such an action. By necessity then,

the defendant is also entitled to an immediate appeal from the denial of his motion for summary judgment. The full constitutional protection guaranteed includes immunity from suit, as well as immunity from liability.

Allowing public officials to have their immunity determined before trial, but forcing the people who elect them to wait until trial to have the immunity question determined is contrary to basic principles of the First Amendment. It allows political speech to be chilled and restrains the open political discussion fundamental to this country. Therefore, a writ for certiorari should be issued to review the decision of the Ohio Supreme Court.

2. The Ohio Supreme Court's Holding That The Denial Of The Petitioner's Summary Judgment Motion Is Not A Final Appealable Order Because, In Libel Actions, The First Amendment Provides For Absolute Immunity For Expressions Of Opinion From Liability, And Not From Suit, Conflicts With Prior Decisions Of This Court.

a. Political Speech And The First Amendment.

Public discourse on political figures is the most fundamental of the freedoms of speech which the First Amendment was in-

tended to protect. This Court has recognized that the need for free debate and evaluation by the people on the qualifications for candidates for public office is necessary to the operation of a Republican system of government. Buckley v. Valeo, 424 U.S. 1,14 (1976) (per curiam). The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office. Monitor Patriot Co. v. Roy, 401 U.S. 265,272 (1971).

The Ohio Supreme Court's decision conflicts with the applications of the principles announced in the above cases, and directly contravenes the fundamental basis of the constitutional protection afforded by the First Amendment.

b. Constitutional Immunity From Suit.

The Ohio Supreme Court's holding conflicts with the Supreme Court's decisions in New York Times and its progeny, which indicate that the First Amendment protection of speech concerning a public, political figure, on matters of public concern, includes immunity from suit for statements which cannot be

provable as false, or cannot reasonably be interpreted as stating actual facts about the public figure involved.

In Milkovich v. Lorain Journal Co., supra, this Court held that the constitutional protection guaranteed by the First Amendment for freedom of speech did not include a separate constitutional privilege for expressions of opinion. 111 L. Ed.2d at 17. The Court reasoned that existing constitutional doctrine adequately secured the right to freedom of expression, making the creation of a separate constitutional distinction between expressions of opinion and expressions of fact unnecessary. Id. at 18.

The Milkovich Court expressly stated that existing constitutional doctrine limited "the type of speech which may be the subject of state defamation actions." Id. at 16. (First emphasis by Court). (Second emphasis added). This Court has previously held numerous examples of rhetoric, hyperbole, invective and vigorous epithets used in the context of campaigns and political controversies as constitutionally protected. In Greenbelt Cooperative Publishing Assn. v. Bresler, 398 U.S. 6,13-14 (1970), the Court held that the imposition for libel on the basis of a newspaper article indicating that "some people" had characterized a real estate developer's negotiating position as "blackmail," was

"constitutionally impermissible." Further, in Hustler Magazine, Inc. v. Falwell, supra, the Court held that the First Amendment precluded recovery under a state emotional distress action for an ad parody which "could not reasonably have been interpreted as stating actual facts about the pubic figure involved." Id. at 50. See, also, Letter Carriers v. Austin, 418 U.S. 264,284-286 (1974) (the use of the word "traitor" in the literary definition of a union "scab" provided no basis for a defamation action under federal labor law).

The above cases indicate that the constitutional protection guaranteed under the First Amendment for discourse and debate in political campaigns and controversies is to provide the speaker with immunity from liability, as a matter of constitutional law. This Court has consistently held that certain rhetorical, epithetical statements used in matters of public concern during political debates and controversy provide no basis for state defamation actions. Thus, the constitutional protection which precludes recovery and prevents liability for such epithets, necessarily provides for immunity from suit as well, because there is no basis for the bringing of the action.

Protection from suit is essential to ensure that expressions of opinion will not be self-censored or chilled in any way. At the heart of the First Amendment is a right to be free from prior restraints, whether or not self-imposed. This is particularly true where, as in the instant case, the speech involved is at the core of First Amendment values, regarding political discourse and public debate.

The Milkovich Court stated that Philadelphia Newspapers, Inc. v. Hepps 475 U.S. 767 (1986) stands for the proposition that statements on matters of public concern "must be provable as false before there can be liability under state defamation law. ..." Milkovich at 18. The Court further stated that Hepps ensures that statements of opinion relating to matters of public concern which do not contain provably false factual connotation will receive "full constitutional protection." Id. (Emphasis added). The Court then explained the difference between a provably false statement and a not provably false statement, indicating that:

> Thus, unlike the statement, 'in my opinion Mayor Jones is a liar' the statement 'in my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin,' would not be actionable. Milkovich, at 18. (Emphasis added).

Thus, the full constitutional protection which is guaranteed under the First Amendment for matters of opinion relating to political campaign situations fully encompasses the right not to be sued for the making of such statements. Statements which are not provably false, or which contain rhetoric which cannot be reasonably interpreted as stating actual facts about the pubic figure involved, are not actionable. This constitutional protection fully covers immunity from suit, as well as immunity from liability. See, Milkovich, at p. 18. Accord, Scott v. Flower, ____ F.2d ____ 1990 Westlaw 119339 p. 14, n. 31 (5th Cir. 1990) (Garwood J., Dissenting). (Citing Milkovich). Consequently, the use of summary proceedings to make this determination and immediate appeals from orders finding the statements actionable are also guaranteed. To otherwise interpret the application of the First Amendment cases by the Supreme Court would emasculate the core of the First Amendment. Campaign rhetoric, political debate and discourse would be chilled by an actual lawsuit or the threat of a pending lawsuit. Injunctive relief could be used to preempt any alleged defamatory remarks which arguably contains only such rhetoric.

The Milkovich case involved a high school wrestling coach who was allegedly defamed by an article in a local paper that accused him of lying to a high school investigatory board. The instant case involves speech made in a partisan political campaign pamphlet during an election for Associate Justice of the Ohio Supreme Court. The distinction between the two plaintiffs and the effects of the litigation is obvious. The chilling effect of the threat and burden of litigation concerning political speech greatly harms open and free discourse on political candidates, and thus limits the rhetorical hyperbole which has "traditionally added much to the discourse of our nation." See, Falwell, at 53-55. The chilling effect on the nature of political discourse and public debate is created by the expense and burden of litigation, and the threat thereof, and not simply the threat of liability.

Thus, the Ohio Supreme Court's decision that the nature of the immunity guaranteed by the constitution for the expression of opinion is an immunity from liability and not from suit is clearly

erroneous based on federal First Amendment law.[5] A writ of certiorari should be granted to clarify the position of the Supreme Court on this important question, and to ensure that those denied summary judgment motions in libel and defamation actions of this type are given the full protection guaranteed them by the First Amendment.

Further, this case gives this Court the opportunity to indicate its position, if any, on the "negative" method of political campaigning which has become prevalent in today's politics.

3. This Case Presents An Important Question Regarding Whether The Ohio Supreme Court Determination That The Denial Of A Defendant's Summary Judgment Motion In A Libel Action Is Not A Final Appealable Order Denies The Defendant His Constitutional Right To Due Process.

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5 Milkovich held that no separate constitutional protection exists for expressions of opinion. The Milkovich Court indicates that existing constitutional doctrine precludes liability and prevents recovery for certain types of statements which are not provable as false or cannot reasonably be interpreted as representing actual facts about the public figure involved. Implicit in this principle is that a defendant in such a case is immune from suit, as well as from liability, since the types of statements are not actionable. - Thus, the Ohio Supreme Court's decision as to the nature of the immunity guaranteed by the First Amendment and when in the litigation process it may be determined is still a viable issue. The Supreme Court has yet to articulate its position on this issue in a First Amendment context.

The Ohio Supreme Court's decision that the denial of a summary judgment motion in a libel action is not a final appealable order violates the petitioner's right to due process under the Fourteenth Amendment. In cases involving statements of opinion which are not provably false or which cannot reasonably be interpreted as stating facts about the public figure involved, the defendant in the libel action is guaranteed full constitutional protection, which includes immunity from suit as well as immunity from liability. See, discussion, Ante, at pp. 19-26. The failure to provide parties with an immediate appeal from orders denying the immunity necessarily deprives them of their due process by disallowing their right to exercise the constitutional protection guaranteed by the First Amendment.

The Ohio Supreme Court's holding that the Appellate Court had no jurisdiction to determine the propriety of the trial court's denial of the petitioner's summary judgment motion destroys the petitioner's right under the First Amendment which guarantees that such statements must be actionable before he can be liable. The petitioner has the right to have the Court determine whether the statements he made are the type of statements which the Supreme Court has deemed actionable.

The determination that appeals from denials of summary judgment motions in these types of cases are not available, leaves the court system wide open for an influx of defamation cases by disgruntled politicians who lost their elections and desire either a scapegoat or more publicity. The use of summary proceedings in these cases is necessary to promote the free political debate vital to our system of government, to prevent the restraint on such debate that this type of litigation causes, and to provide the defendants with the full constitutional protection guaranteed by the First Amendment. Consequently, the right to an immediate appeal from those summary proceedings is also necessary.

Therefore, the Ohio Supreme Court's decision was erroneous and a writ of certiorari should be issued for review of that decision.

CONCLUSION

A writ of certiorari should issue to review the decision and order of the Ohio Supreme Court for the following reasons:

1) This Court has never ruled on whether the First Amendment right to freedom of speech guarantees immunity from suit as well as immunity from liability, thus encompassing the

right of a defendant in a libel action to have a court determine in a summary proceeding whether the alleged libelous statements are of a type which provide a basis for such action;

2) This case gives the Court the opportunity to clarify and articulate its position concerning the propriety of summary proceedings and immediate appeals therefrom as a method of ensuring that a defendant in a libel action receives the full constitutional protection guaranteed by the First Amendment;

3) This case presents an opportunity for the Court to decide whether the denial of an immediate appeal from a denial of a defendant's motion for summary judgment in a libel action deprives the defendant of his rights to due process;

4) This case presents the opportunity for the Court to ensure full and candid political debate will continue to exist in political campaigns despite being vitriolic in nature, and will continue to add to the discourse of our nation; and

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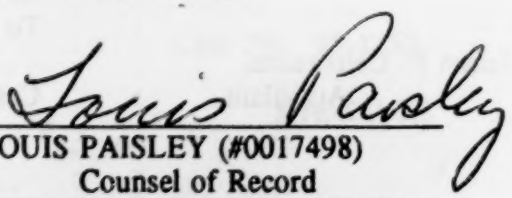
5) This case presents an opportunity for the Court to establish parameters for political rhetoric in view of the national debate on the politics of "negative" political campaigns.

Respectfully submitted,



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APPENDIX

ENTRY OF THE OHIO SUPREME COURT
(filed July 3, 1990)

THE SUPREME COURT OF OHIO

1990 TERM

	:	To wit: July 3, 1990
James P. Celebrezze,	:	
Appellant,	:	Case No. 88-1755
	:	
v.	:	ENTRY
	:	
Robert E. Netzley et al.,	:	
Appellees.	:	

This case came on for further consideration upon appellees' motion for rehearing and for stay. Upon consideration thereof,

IT IS ORDERED by the Court that said motions be, and the same are hereby, denied.

(Court of Appeals Nos. 53864 & 53865)

/s/ Robert E. Holmes
ROBERT E. HOLMES
Acting Chief Justice

MANDATE OF THE OHIO SUPREME COURT
(filed May 16, 1990)

THE SUPREME COURT OF OHIO

1990 TERM

	:	To wit: May 16, 1990
James P. Celebrezze, Appellant,	:	Case No. 88-1755
v.	:	MANDATE
Robert E. Netzley et al., Appellees.	:	

To the Honorable Court of Common Pleas

Within and for the County of Cuyahoga, Ohio.

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the court of appeals applicable to appellees is reversed and the cause is remanded to the trial court for further proceedings consistent with the opinion rendered herein.

COSTS:

Motion Fee, $20.00, paid by Don C. Iler Co., L.P.A.

(Court of Appeals Nos. 53864 & 53865)

/s/ Robert E. Holmes
ROBERT E. HOLMES
Acting Chief Justice

JUDGMENT ENTRY
APPEAL FROM THE COURT OF APPEALS
(filed May 16, 1990)

THE SUPREME COURT OF OHIO

1990 TERM

	:	To wit: May 16, 1990
James P. Celebrezze,	:	
Appellant,	:	Case No. 88-1755
	:	
v.	:	JUDGMENT ENTRY
	:	
Robert E. Netzley et al.,	:	APPEAL FROM THE
Appellees.	:	COURT OF APPEALS

This cause, here on appeal from the Court of Appeals for Cuyahoga County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals applicable to appellees is reversed and the cause is remanded to the trial court for further proceedings consistent with the opinion rendered herein.

It is further ordered that the appellant recover from the appellees its costs herein expended; and that a mandate be sent to the Court of Common Pleas for Cuyahoga County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

(Court of Appeals Nos. 53864 & 53865)

/s/ Robert E. Holmes
ROBERT E. HOLMES
Acting Chief Justice

**OPINION OF THE
OHIO SUPREME COURT
(filed May 16, 1990)**

THE SUPREME COURT OF OHIO

CELEBREZZE, Appellant,

v.

NETZLEY et al., Appellees.

No. 88-1755

Supreme Court of Ohio

Submitted March 6, 1990

Decided May 16, 1990

During the 1984 campaign for election of associate justices to the Supreme Court of Ohio, the Executive Committee of the Miami County Republican Party ("Committee") printed and distributed a campaign brochure encouraging the election of the entire Republican slate of candidates. The brochure made an ethnic reference concerning the appellant, James P. Celebrezze, to which Celebrezze objected.

Celebrezze was not reelected associate justice. After the election, the appellee Plain Dealer Publishing Company ("Plain Dealer") ran an article about the brochure. Two days later, the Plain Dealer published an editorial which was highly critical of the brochure and of appellee Robert Netzley, the Chairman of the Miami County Republican Party's Executive Committee, who had allegedly refused to apologize for the brochure.

On February 6, 1985, appellant commenced this action for libel, invasion of privacy, and intentional infliction of emotional distress against Netzley, the Committee, the Plain Dealer, and Mary Anne Sharkey, then a reporter for the Plain Dealer's

Columbus office. The court dismissed the invasion of privacy claim, and the Plain Dealer and Sharkey filed motions for summary judgment, which were granted. Similar motions for summary judgment filed by Netzley and the Committee were overruled. In making its findings, the court determined that there was no just reason for delay, pursuant to Civ. R. 54(B). Notices of appeal were filed by Netzley, the Committee, and appellant.

The court of appeals affirmed the grant of summary judgment in favor of the Plain Dealer and Sharkey. The court reversed, however, the trial court's denial of summary judgment in favor of Netzley and the Committee. In determining the threshold question of its jurisdiction of the appeal from such order, the court held that "denying a defendant as a matter of law the absolute immunity accorded expressions of opinion in a defamation action affects a substantial right and is made in a special proceeding," and that thus the order was a final appealable order, pursuant to R.C. 2505.02. Having found jurisdiction, the court of appeals held that the brochure statements were expressions of hyperbolic opinion entitled to the protections of the First Amendment.

The cause is now before this court upon the allowance of a motion to certify the record.

Don C. Iler Co., L.P.A., and Don C. Iler, for appellant.

Weston, Hurd, Fallon, Paisley & Howley, Louis Paisley and Hernan N. Visani, for appellee Robert E. Netzley.

Huffman, Landis & Weaks and Robert Huffman, for appellee Miami County Republican Committee.

PER CURIAM.

[1] The controlling issue in this case is whether the denial of a motion for summary judgment constitutes a final appealable order, pursuant to R.C. 2505.02, where such motion is premised upon the assertion of an absolute immunity from liability in defamation actions accorded under the First Amendment to expressions of opinion. For the reasons which follow, we answer such query in the negative, and thus reverse the decision of the court of appeals.

R.C. 2505.02 provides, in pertinent part:

> "An order that affects a substantial right in an action which in effect determines the action and prevents a judgment, an order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order that vacates or sets aside a judgment or grants a new trial is a final order which may be reviewed, affirmed, modified, or reversed, with or without retrial."

An order, to be final, must fit into at least one of the thre categories set forth in R.C. 2505.02. General Electric Supply Co v. Warden Electric, Inc., (1988), 38 Ohio St.3d 378, 528 N.E.2 195, syllabus.

[2] The trial court's grant of summary judgment in favor o defendants Sharkey and the Plain Dealer "determine[d] the action as to these parties, and was thus a final order pursuant to R.C 2505.02. Together with the appropriate Civ.R. 54(B) language it was a final appealable order, even though the summary judg ment motions filed by appellees Netzley and the Committee wer denied. Noble v. Colwell (1989), 44 Ohio St.3d 92, 540 N.E.2 1381, at syllabus.

[3] The denial of a motion for summary judgment does no determine the action and prevent a judgment, and thus generall does not constitute a final order under R.C. 2505.02. Nayman v Kilbane (1982), 1 Ohio St.3d 269, 271, 1 OBR 379, 380-381, 43 N.E.2d 888, 890; Balson v. Dodds (1980), 62 Ohio St.2d 287, 1 0.0.3d 329, 405 N.E.2d 293, paragraph one of the syllabus; State ex rel. Overmeyer, v. Walinski (1966), 8 Ohio St.2d 23, 3

0.0.2d 358, 222 N.E.2d 312.[1] Further, as this court observed in Noble, supra, 44 Ohio St.3d at 96, 540 N.E.2d at 1385, the trial court's use of Civ. R. 54(B) language "does not turn an otherwise non-final order into a final appealable order."

[4] Here, however, appellees argue, and the court of appeals held, that the trial court's order denying summary judgment on the ground that the alleged libelous statements were actionable statements of fact -- not expressions of opinion -- affects "a substantial right made in a special proceeding," and is thus a final order under the second category of R.C. 2505.02. There is little doubt that the denial of summary judgment below affects a substantial right, i.e., the right to express one's opinion as guaranteed by the First Amendment to the United States Constitution and Section 11, Article I of the Ohio Constitution.

However, the order denying summary judgment was not "made in a special proceeding" as this court has previously construed that term. See, e.g., General Acc. Ins. Co. v. Insurance Co. of North America (1989), 44 Ohio St.3d 17, 540 N.E.2d 266, paragraph two of the syllabus (order in a declaratory judgment action); Tilberry v. Body (1986), 24 Ohio St.3d 117, 24 OBR 308, 493 N.E.2d 954 (order in a statutory dissolution of a partnership); Humphry v. Riverside Methodist Hosp. (1986), 22 Ohio St.3d 94, 22 OBR 129, 488 N.E.2d 877 (order compelling disclosure of confidential information); Amato v. General Motors Corp. (1981), 67 Ohio St.2d 253, 21 0.0.3d 158, 423 N.E.2d 452 (certification of a class under Civ. R. 23[C]). Cf. Bernbaum v. Silverstein (1980), 62 Ohio St.2d 445, 16 0.0.3d 461, 406 N.E.2d

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[1] State, ex rel. Overmeyer v. Walinski, supra, involved a publisher (Overmeyer) who had been named as a defendant in a libel action. Overmeyer had moved for summary judgment, which was denied by the trial court. Overmeyer then brought a mandamus action in this court, asserting that the judge had a mandatory duty to enter summary judgment on his behalf. This court denied the writ, citing the above authority that a denial of summary judgment is not a final order, and holding that mandamus cannot be used to create an appeal from an order which is not a final order. Id. 8 Ohio St.2d at 23-24, 37 0.0.2d at 358-359, 222 N.E.2d at 312.

532 (overruling a motion to disqualify counsel is not an order made in a special proceeding), and cases cited therein at 447, 16 0.0.3d at 462-463, 406 N.E.2d at 534. The court's order in this case was made in "a straightforward civil action," Noble, supra, 44 Ohio St.3d at 94, 540 N.E.2d at 1383, that is, one for defamation.

Nor is a denial of summary judgment converted into a "special proceeding" in and of itself by virtue of the First Amendment interest involved. The court of appeals seized upon our statement in Scott v. NewsHerald (1986), 25 Ohio St.3d 243, 250, 25 OBR 302, 307, 496 N.E.2d 699, 705, that "[e]xpressions of opinion are generally accorded absolute immunity from liability under the First Amendment," and erroneously concluded that "[i]mmunity from damages necessarily includes immunity from trial." The court of appeals then analogized this case to federal cases permitting the interlocutory appeal of orders denying motions asserting an absolute or qualified immunity defense pursuant to the collateral order doctrine adopted in Cohen v. Beneficial Indus. Loan Corp. (1949), 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528.

[5] We do not rely upon these cases here. Under the federal collateral order doctrine, orders which do not terminate the proceedings in the district court are final and appealable for purposes of Section 1291, Title 28, U.S. Code, if they (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) are effectively unreviewable on appeal from a final judgment. Coopers & Lybrand v. Livesay (1978), 437 U.S. 463, 468, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351. This doctrine involves judicial construction of the federal final order statute and is thus not applicable to the states, although a state may of course adopt a similar rule under its own statutes. Borman v. Borman (1979), 378 Mass. 775, 393 N.E.2d 847. This court has not adopted a similar collateral order rule, and even if we had, this case would not come within the ambit of such rule.

First, the issue presented in this case is not "completely separate from the merits of the action." Indeed, the question of whether appellees, statements constituted opinion or fact is an

essential issue in every defamation action - it is not a collateral issue. See Van Cauwenberghe v. Biard (1988), 486 U.S. 517, 527-530, 108 S.Ct. 1945, 1952-1954, 100 L.Ed.2d 517 (denial of a motion to dismiss on the ground of forum non conveniens is not completely separate from the merits of the action and thus is not immediately appealable under the collateral order doctrine).

Second, the issue presented by appellees, motions for summary judgment is not "effectively unreviewable on appeal from a final judgment." Each of the cases relied upon by the court of appeals dealt with immunity from suit rather than defense to liability. See Nixon v. Fitzgerald (1982), 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (absolute Presidential immunity); Smith v. McDonald (C.A.4, 1984), 737 F.2d 427, affirmed sub nom. McDonald v. Smith (1985), 472 U.S. 479, 105 S.Ct. 2787, 86 L.Ed.2d 384 (absolute immunity); Kennedy v. Cleveland (C.A.6, 1986), 797 F.2d 297; Mitchell v. Forsyth (1985), 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (qualified immunity of Attorney General from suit).

"The critical question, following Mitchell, is whether, the essence, of the claimed right is a right not to stand trial. * * * This question is difficult because in some sense, all litigants who have a meritorious pretrial claim for dismissal can reasonably claim a right not to stand trial. But the final-judgment rule requires that except in certain narrow circumstances in which the right would be ,irretrievably lost, absent an immediate appeal, Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 431, 105 S.Ct. 2757, 2761, 86 L.Ed.2d 340 (1985), litigants must abide by the district court's judgments, and suffer the concomitant burden of a trial, until the end of proceedings before gaining appellate review." Van Cauwenberghe, supra, 486 U.S. at 524, 108 S.Ct. at 1950. Thus, the focus of the federal cases is whether the individual has a right not to stand trial simply because of who he is, e.g., whether he is protected from standing trial because of an immunity attaching to the office he holds. Nixon, supra; Mitchell, supra. The "essence" of this personal immunity, for example, that the President of the United States is absolutely immune from being haled into court for all acts within the outer perimeters of his duties of office "is effectively lost if a case is

erroneously permitted to go to trial." Mitchell, supra, 472 U.S. at 526, 105 S.Ct. at 2815.

The "essence" of the claimed "immunity" in the case before us today is that when a person, any person, is haled into court on a libel claim he will not be liable for his actions or statements if they constitute protected opinion rather than assertions of fact. Such a claimed right is not lost if a motion for summary judgment fails and a trial ensues. The right to be free from liability for expressions of opinion can certainly be vindicated on appeal. The issue is eminently reviewable on appeal from final judgment, and thus is not an immediately appealable collateral order.[2]

For this same reason, the denial of summary judgment in defamation actions is not "an order made in a special proceeding," pursuant to R.C. 2505.02, for" [a] prime determinant of whether

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[2] This was at least implicitly recognized by the court in Time, Inc. v. McLaney (C.A.5, 1969), 406 F.2d 565, 566, where, in a libel action against a magazine publisher, the district court denied the publisher,s motion for summary judgment, and the publisher appealed:

> "We are here presented with an unusual appeal, since it has heretofore hardly ever fallen to the lot of this court to consider an appeal from the denial by the trial court of a motion for summary judgment. Prior to the adoption by the Congress of the 1958 Amendment to 28 U.S.C.A. 1292, by adding Section (b), no appeal could be taken from such an order by the trial court because it was not a final order. Now, however, this court has jurisdiction to entertain such an appeal when the provisions of Section (b) are complied with.
>
> "Here the trial court made the required certificate and this court, on December 7, 1967, entered its order granting the application provided for under Section 1292(b)." (Emphasis sic.)

We hasten to add that in addition to the federal collateral order rule being of no effect in this state, our Appellate Rules do not contain a mechanism for certification by the trial court of non-final, interlocutory appeals analogous to Section 1292(b), Title 28, U.S.Code. See App.R. 4(A).

a particular order is one made in a special proceeding is the practicability of appeal after final judgment. * * * " Amato, supra, 67 Ohio St.2d at 258, 21 O.O.3d at 161, 423 N.E.2d at 455-456, quoting Bernbaum, supra, 62 Ohio St.2d at 447, 16 O.O.3d at 463, 406 N.E.2d at 534.

To hold, as did the court below, that the denial of a motion for summary judgment in a defamation action is a final appealable order would invite a multitude of interlocutory appeals in civil actions of all types, under the guise that such rulings were made in "special proceedings." This court has been quite careful in the past to avoid such a result. See Amato, supra, 67 Ohio St.2d at 257, 21 0.0.3d at 161, 423 N.E.2d at 455; Bernbaum, supra, 62 Ohio St.2d at 447, 16 0.0.3d at 463, 406 N.E.2d at 534. Appellees, claim is not in the nature of an immunity from suit, but is simply an assertion of a defense on the merits of the action itself. If a trial court determines, as here, that a genuine issue exists as to whether the allegedly libelous statements were not protected expressions of opinion, then summary judgment must be denied, and such denial "is reviewable on appeal by the movant [only] from a subsequent adverse final judgment." Balson v. Dodds, supra, at paragraph one of the syllabus.

Because the denial of appellees, motions for summary judgment was not made in a special proceeding and is not otherwise a final appealable order, the court of appeals was without jurisdiction to hear appellees' appeals. Accordingly, the judgment of the court of appeals applicable to appellees is reversed, and the cause is remanded to the trial court for further proceedings.

Judgment reversed and cause remanded.

HOLMES, Acting C.J., and GLASSER, CACIOPPO, HERBERT R. BROWN and RESNICK, JJ., concur.

PUTMAN and SHANNON, JJ., dissent.

NORMAN J. PUTMAN, J., of the Fifth Appellate District, sitting for MOYER, C.J.

RAYMOND E. SHANNON, J., of the First Appellate District, sitting for SWEENEY, J.

GEORGE M. GLASSER, J., of the Sixth Appellate District, sitting for DOUGLAS, J.

MARY CACIOPPO, J., of the Ninth Appellate District, sitting for WRIGHT, J.

PUTMAN, Justice, dissenting.

I must respectfully dissent. The fear that judges will have to work harder cannot be permitted to stifle robust political criticism of the judiciary. This lawsuit brought by a former member of the judiciary seeking to punish in the courts a citizen who had been critical was doomed to failure when, after it was filed, the United States Supreme Court, on February 24, 1988, decided Hustler Magazine v. Falwell (1988), 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41.

However despicable or unjustified it may be, political criticism must remain free from the expense of avoidable repetitive litigation.

The First Amendment's guarantee of free speech carries with it the mandate that the channels for political change be left open. Apprehension of the expense of defending libel suits imposes a self-censorship upon political critics.

I would find jurisdiction to have existed in the court of appeals from Section 3(B)(1)(f), Article IV of the Ohio Constitution, "original jurisdiction * * * [i]n any cause upon review as may be necessary to its complete determination," and put a merciful rest to this lawsuit.

The majority opinion elevates form over substance. When this case goes back for trial, there can be only one outcome if the trial court applies the law correctly. The court of appeals has already reached the correct conclusion. It had jurisdiction directly from a constitutional amendment adopted May 7, 1968. No issue of "special proceeding" or Civ. R. 54(B) is involved. The judi-

ciary must not let itself fall into slumber only to wake to find itself tethered by Lilliputians with bonds fashioned from the remnants of outmoded ritual. The visionaries who drew Section 3(B) (1)(f), Article IV must have foreseen what we have before us in this case. The end to be suffered by plaintiff is, in law, inevitable. Let his case be interred decently now. No purpose is served by wringing hands in helpless piety at the graveside.

The polestar that should guide our judgment is not whether the "floodgates" of appeals are opened but whether the "floodgates" for free speech are kept open.

SHANNON, J., concurs in the foregoing dissenting opinion.

JOURNAL ENTRY AND OPINION
OF THE EIGHTH DISTRICT COURT
OF APPEALS
CUYAHOGA COUNTY, OHIO
(filed August 4, 1988)

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

James P. Celebrezze, Plaintiff-Appellant Cross-Appellee	:	Case Nos. 53864 and 53865
v.	:	JOURNAL ENTRY AND OPINION
Robert E. Netzley et al., Defendant-Appellees Cross-Appellants	:	

DATE OF ANNOUNCEMENT OF DECISION: AUGUST 4, 1988

CHARACTER OF PROCEEDING: Civil appeal from Common Pleas Court Case No. 086,740

JUDGMENT: AFFIRMED IN PART AND REVERSED IN PART.

DATE OF JOURNALIZATION: _____

APPEARANCES:

For Plaintiff-Appellant, Cross-Appellee:
Don C. Iler
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For Defendant-Appellee, Cross-Appellant, Robert E. Netzley	Louis Paisley WESTON, HURD, FALLON, PAISLEY & HOWLEY 2500 Terminal Tower Cleveland, Ohio 44113
For Defendant-Appellees, Plain Dealer Publishing Co. and Mary Anne Sharkey:	Belinda J. Scrimenti BAKER & HOSTETLER 3200 National City Center Cleveland, Ohio 44114
For Defendant-Appellee, Cross-Appellant, Miami County Republican Committee:	Robert J. Huffman HUFFMAN, LANDIS, WEAKS & LOPEZ 103 N. Miami Street West Milton, Ohio

STILLMAN, P.J.:

This appeal arises as a result of an action for libel, invasion of privacy and the intentional infliction of emotional distress filed by appellant/cross-appellee, James P. Celebrezze, against appellees, Plain Dealer Publishing Co. (hereinafter "Plain Dealer") and Mary Anne Sharkey (hereinafter "Sharkey") and against cross-appellants, Robert E. Netzley (hereinafter "Netzley") and Miami County Republican Committee (hereinafter the "Committee").

Appellant was an Associate Justice on the Supreme Court of Ohio beginning January 11 , 1983, and was the Democratic nominee for that position in the November, 1984 general election. The campaigns for the positions on the supreme court were vigorous and generated much public debate.

Netzley is a member of the Ohio House of Representatives from Miami County and has been an elected official for twenty-five years. At the time of this controversy Netzley was a member of the House of Representatives' Finance Appropriation Committee, Ways and Means Committee, Taxation and Insurance Committee, and State Controlling Board. Netzley is also active in Ohio Republican politics, and is the State Committeeman for the Eighth Congressional District and Executive Committee

Chairman of the Republican party in Miami County. As Executive Committee Chairman Netzley has the responsibility of supervising and organizing campaigns for local Republican candidates and assisting in statewide Republican campaigns.

Prior to the 1984 general election, on behalf of the Committee, Netzley authored a campaign brochure[1] which was mailed to all registered voters in Miami county. One-sixth of the brochure was devoted to the Ohio supreme court rules. The brochure provided, in relevant part, as follows:

What others say about the Ohio Supreme Court:

> 'The Ohio Supreme Court now being administered by Chief Justice Frank Celebrezze and his cronies is the crudest, most partisan, most vindictive in memory, and the most dangerous. . . .' 'Only the voters of Ohio can stop it.'
>
> Dayton Daily News 10-7-84
>
> It's no wonder that some are calling Ohio's Justice System the 'MAFIA FAMILY' Court. Take a look. Frank Celebrezze, Chief Justice. Brother Jimmy Celebrezze, Associate Justice. Cousin Tony Celebrezze, Ohio Attorney General, and Frank Celebrezze's,

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[1] The entire brochure, which was reproduced from appellant's exhibits to his brief in opposition to Netzley's motion for summary judgment, is appended hereto as Exhibit "A".

"crony" Angelo Gagliardi, the intimidator in charge of the Ohio Disciplinary Council.

Considerable controversy arose after the brochure became public. James Ruvolo, State Democratic Party Chairman, complained about the brochure to Joseph Rice, a reporter and then Acting State Editor of The Plain Dealer newspaper. Rice informed Sharkey, a reporter in The Plain Dealer's Columbus office who had been assigned to cover the 1984 Ohio supreme court races. Sharkey had already done extensive reporting on the Administration of the court and the state judicial system by then Chief Justice Frank D. Celebrezze, appellant's brother, and the ongoing dispute between the court and the Ohio State Bar Association. Sharkey had not yet seen the brochure.

After the election, in which appellant was defeated, Ruvolo told Rice that he was considering filing a complaint with the Ohio Elections Commission. Ruvolo also appeared on the Columbus television show "Issue," a political debate program, to analyze the election results and at that time he expressed his distaste for the brochure's contents regarding the Ohio supreme court.

On November 14, 1984, during a post-election interview with Attorney General Anthony J. Celebrezze, Jr., the Attorney

General gave Sharkey a copy of the brochure and told her that "as a lawyer [he felt] it [was] libelous." (Sharkey Affidavit at 4.) After the interview, Sharkey spoke with Rice and they both agreed that the brochure had created considerable controversy. Rice suggested doing a story on the brochure and its controversy for the newspaper.

After investigating the matter further, Sharkey and Rice prepared an article which was published in The Plain Dealer on November 16, 1984, in different editions under two headlines: "GOP boss firm on court-Mafia tie" and "Netzley firm on Celebrezze-Mafia ad."[2] The article provided that:

> COLUMBUS -- State Rep. Robert E. Netzley, chairman of the Miami County Republican Party, said yesterday he is not backing down from his organization's election brochure which said Ohio's justice system is run by the 'Mafia family.'
>
> The brochure, mailed to Miami County Republicans before the Nov. 6 election, said
>
> 'It's no wonder that some are calling Ohio's Justice System the 'MAFIA FAMILY' Court. Take a look. Frank Celebrezze, Chief Justice, Brother Jimmy

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[2]. These articles are reproduced as they appeared in the newspaper from appellant's exhibits attached to his brief in opposition to Plain Dealer's and Sharkey's motion for summary judgment and are appended hereto as Exhibits "B" and "C," respectively.

Celebrezze, Associate Justice, Cousin Tony Celebrezze, Ohio Attorney General and Frank Celebrezze's 'crony' Angelo Gagliardo, the intimidator in charge of the Ohio Disciplinary Counsel.'

Democrats James Celebrezze and Cuyahoga County Common Pleas Judge John E. Corrigan lost to Republicans Craig Wright, a Franklin County Common Pleas Judge, and Appeals Judge Andy Douglas of Toledo, respectively Nov. 6.

In a letter, Frank E. Bazler, president of the Ohio State Bar Association and a Miami County Republican, called on Netzley and the Miami County Republican Party to apologize to the Celebrezzes and Gagliardo.

'Frankly, I am appalled by that paragraph and deplore the poor judgment in its inexcusable use,' Bazler wrote.

Netzley, R-6B, of Laura, yesterday rejected Bazler's demand for an apology.

'I'm not apologizing to that court, I tell you' he said. 'That's the way we feel about the court and the whole system.'

Asked who the 'some' in the brochure referred to, Netzley said 'A lot of people in Miami County feel that way.'

Attorney General Anthony J. Celebrezze Jr. was dismayed by the brochure and said yesterday 'as a lawyer, I feel it is libelous.'

Chief Justice Frank D. Celebrezze said, 'I thought that type of name-calling had gone out with the advent of the 20th century . . . that was the type of advertising we had to contend with.'

He said he does not know anyone in the Mafia.

Bazler's defense of the Celebrezze family pleased the chief justice.

'That was very gentlemanly of him,' he said. 'Things like this are the type of thing the bar association ought to be interested in.'

Frank Celebrezze and Bazler are to meet Wednesday to discuss the two-year-old feud between the court and bar association. Celebrezze had previously refused requests to meet with bar officials.

Dennis Whalen, spokesman for the state bar, called the meeting 'a positive development.'

On February 6, 1985, appellant commenced this action for libel, invasion of privacy and intentional infliction of emotional distress. The court dismissed the privacy claim and the defendants moved for summary judgment on the remaining claims. Netzley and the Committee relied upon Netzley's deposition, the brochure, a transcript of appellant's testimony, certain political definitions and numerous news articles. Plain Dealer and Sharkey relied upon the affidavits of Sharkey and Rice, as well as excerpts from Netzley's deposition and eleven additional attached exhibits. Appellant, in his briefs in opposition to the summary judgment

motions, relied upon the depositions of Sharkey,[3] Rice,[4] Douglas F. Kramer (a copy editor for Plain Dealer) and Netzley. On April 28, 1987, in a lengthy and well-written opinion, the court granted summary judgment in favor of Plain Dealer and Sharkey and denied summary judgment for Netzley and the Committee. Pursuant to Civ. R. 54(B), the court indicated its intent to make its decisions final and determined there was no just reason for delay. The losing parties timely appealed.

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[3] Plain Dealer and Sharkey have urged this Court to disregard the depositions of Sharkey and Rice because the depositions were not signed by Sharkey or Rice and their signatures were not waived nor were they signed by the court reporter with a statement regarding the absence of the witnesses' signatures as required by Civ. R. 30. Although appellees raised this point at the trial level in a footnote in their reply brief to appellant's brief in opposition to appellees' summary judgment motion, no motion to suppress the depositions or parts thereof was filed as required by Civ. R. 32(D)(4) and 30(E). However, appellees' objection may be construed as the motion to suppress, Nickey v. Brown (1982), 7 Ohio App. 3d 32, 36, 454 N.E.2d 177, and in that regard should have been granted. Sharkey and Rice should have had the opportunity to review and sign their depositions pursuant to Civ. R. 30(E). The disposition of this case would be the same, however, even if the depositions were considered.

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[4] See id.

I. Jurisdiction

The Constitution of the State of Ohio confers jurisdiction on this Court to review appeals of final orders. Ohio Const. art. IV, sec. 3(B)(2). A final order is defined by statute as:

> [a]n order that affects a substantial right in an action which in effect determines the action and prevents a judgment, an order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order that vacates or sets aside a judgment or grants a new trial . . . .

R.C. 2505.02. Ordinarily, the denial of a motion for summary judgment does not constitute a final appealable order. Nelson v. Dodds (1980), 62 Ohio St. 2d 287, 405 N.E.2d 293; Ohio Edison Co. v. Babcock & Wilcox Co. (Mar. 20, 1980), Cuyahoga App. No. 40672, unreported. Netzley and the Committee argue, however, that the court's order denying their summary judgment motions affected a substantial right made in a special proceeding and was therefore immediately appealable.[5]

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[5] The trial court's use of the Civ. R. 54(B) language cannot convert an otherwise nonappealable interlocutory order into a final order. Norvell v. Cuyahoga County Hospital (1983), 11 Ohio App. 3d 70, 463 N.E.2d 111.

The precise issue before this Court is whether the trial court's order denying summary judgment in a defamation action on the ground that the alleged libelous statement was not an expression of opinion but an actionable statement of fact affects a substantial right in a special proceeding?

Due to the policy of promoting the prompt and orderly disposition of lawsuits, the Supreme Court of Ohio generally has been reluctant to expand the term "special proceeding" to include the immediate review of interlocutory orders during the pendency of a civil action. Bernbaum v. Silverstein (1980), 62 Ohio St. 2d 445, 447, 406 N.E.2d 532. However, the court has retained some flexibility and has recognized that certain rulings made during the pendency of a civil action require immediate review. See Tilberry v. Body (1986), 24 Ohio St. 3d 117, 493 N.E.2d 954 (judicial dissolution of partnership); Humphry v. Riverside Methodist Hospital (1986), 22 Ohio St. 3d 94, 488 N.E.2d 877 (discovery order compelling disclosure of information concerning hospital-patient confidentiality and statutory privilege). In order to determine whether a particular order affects a substantial right in a special proceeding, a court must weigh "the harm to the 'prompt and orderly disposition of litigation,' and the consequent waste of

judicial resources, resulting from the allowance of an appeal, with the need for immediate review because appeal after final judgment is not practicable." Amato v. General Motors Corp. (1981), 67 Ohio St. 2d 253, 258, 423 N.E.2d 452. In other words, if "there is an appreciable need for immediate review, . . . the ordinary course of a proceeding to final adjudication [may] be interrupted." Humphry, 22 Ohio St. 3d at 96.

The substantial right affected in this case is the guaranteed right to express an opinion pursuant to the first amendment of the Constitution of the United States and Article I, Section 11 of the Constitution of the State of Ohio. Since expressions of opinion are afforded absolute immunity from liability, see Scott v. News-Herald (1986), 25 Ohio St. 3d 243, 250, 496 N.E.2d 699, and our disposition infra of Netzley's and the Committee's first assignments of error, the trial court's order effectively denied appellants this guarantee.

Concommitant with an absolute immunity from liability (the possible consequence of litigation) would be the protection from the burden of defending litigation. Immunity from damages necessarily includes immunity from trial. Deferring the resolution of a claim of absolute immunity from suit until after trial defeats

the substance of the privilege itself. Smith v. McDonald (4th Cir. 1984), 737 F.2d 427, 428. An appeal after judgment simply would not be practicable to vindicate this harm. Moreover, as in Tilberry, judicial resources will actually be conserved by allowing an appeal of this question of law early on. Judicial resources at the trial level are also conserved if alleged defamatory remarks are adjudicated to be nonactionable opinions since the litigation would be ended. Finally, a "chilling effect" or self-censorship in first amendment cases is more likely to occur without an initial exhaustive review of whether certain material is immune from suit due to the burdens of defending lawsuits through trials which may have been avoided by a simple immediate appeal of the initial question of law.

Federal courts, although governed by different laws concerning final orders, see 28 U.S.C. 1291, have permitted appeals of orders denying motions asserting an absolute immunity defense pursuant to their collateral order doctrine. See, e.g., Nixon v. Fitzgerald (1982), 457 U.S. 731; Kennedy v. City of Cleveland (6th Cir. 1986), 797 F.2d 297; Smith v. McDonald (4th Cir. 1984), 737 F.2d 427, aff'd (1985), McDonald v. Smith, 472

U.S. 479. In discussing the immediate appealability of a denial of qualified immunity, the United States Supreme Court stated that:

> The entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial. Accordingly, the reasoning that underlies the immediate appealability of an order denying absolute immunity indicates to us that the denial of qualified immunity should be similarly appealable: in each case, the district court's decision is effectively unreviewable on appeal from a final judgment.

Mitchell v. Forsyth (1985), 472 U.S. 511, 526-27 (emphasis in original).

Based upon the foregoing analysis, we hold that a trial court order denying a defendant as a matter of law the absolute immunity accorded expressions of opinion in a defamation action affects a substantial right and is made in a special proceeding. The order denying absolute immunity is therefore a final appealable order.

II. Netzley and Committee Appeal

Netzley's and the Committee's assignments of error which are substantially identical will be addressed together. Their first assignments of error are respectively that:

> THE TRIAL COURT ERRED IN INTERPRETING AND APPLYING THE SCOTT/OLLMAN "TOTALITY OF THE CIRCUMSTANCES" TEST AND IN DENYING APPELLANT THE DEFENSE OF ABSOLUTE IMMUNITY ACCORDED TO EXPRESSIONS OF OPINION.
>
> THE TRIAL COURT ERRED IN DETERMINING THAT THE STATEMENTS WERE STATEMENTS OF FACT RATHER THAN CONSTITUTIONALLY PROTECTED OPINION.

Both the United States Supreme Court and the Supreme Court of Ohio have recognized as a general rule that expressions of opinion will not subject a party to liability for defamation. Gertz v. Robert Welch, Inc. (1974), 418 U.S. 323, 339-40; Scott v. News-Herald (1986), 25 Ohio St. 3d 243, 250, 496 N.E.2d 699. The Ohio supreme court adopted a totality of circumstances test based on the test announced in Ollman v. Evans (D.C. Cir. 1984), 750 F.2d 970, cert. denied (1985), 471 U.S. 1127, to distinguish between statements of fact and expressions of opinion. Scott, 25 Ohio St. 3d at 250. Four factors are to be considered when

examining a statement: (1) the specific language used; (2) the verifiability of the statement; (3) the general context of the statement; and (4) the broader context in which the statement appeared. Id. This examination to determine whether a statement is opinion or fact is a matter of law for the court to decide. After considering all four factors, the trial court decided that each factor led to the conclusion that the following statements were statements of fact:

> It's no wonder that some are calling Ohio's Justice System the 'MAFIA FAMILY' Court. Take a look. Frank Celebrezze, Chief Justice. Brother Jimmy Celebrezze, Associate Justice. Cousin Tony Celebrezze, Ohio Attorney General, and Frank Celebrezze's, 'crony' Angelo Gagliardi, the intimidator in charge of the Ohio Disciplinary Counsel.

This Court's analysis, however, leads to the opposite conclusion.

Under the first prong of the test, the specific language used must be examined "as such language is commonly understood . . . ." Id. at 250-51. The particularly offensive language here is the word "mafia." Although Netzley and the Committee have argued that the word "mafia" has multiple meanings, e.g., to depict cronyism in a political sense, we agree with the trial court that the common meaning of the word "mafia" is an organized underground criminal syndicate. Moreover, it is common to associate

mafia members with those of Italian descent. The statement herein emphasizes that association. It is not surprising, therefore, that the lower court concluded that the use of the word "mafia" in this case implicated appellant with the mafia and its unsavory influence. Such a representation by the specific offensive language herein standing alone is not an opinion immune from potential liability. The remaining factors, however, convince this Court that Netzley's and the Committee's publication was merely an expression of opinion.

The second prong of the totality test concerns the verifiability of the statement. Nothing is stated or implied in the statement to substantiate the implication that appellant is connected with the mafia. The words "some are calling" are broad and too general to establish the verifiability of the implication or to imply that undisclosed facts exist to verify the statement. The statement is simply not objectively capable of proof or disproof. The trial court indicated at p. 9 of its opinion that the "statement is absolutely not verifiable" and we agree. Accordingly, these statements are more likely to be expressions of opinion. See id. at 251-52. "[A] reader cannot rationally view an unverifiable statement as conveying actual facts." Ollman, 750 F.2d at 981.

The third factor requires an examination of the context in which the statements occurred. The trial court focused on the noted source of the language, i.e., the Dayton Daily News, rather than the language itself. The Supreme Court of Ohio has indicated that "[o]bjective cautionary terms, or 'language of apparency' places a reader on notice that what is being read is the opinion of the writer." Scott, 25 Ohio St. 3d at 252; see Ollman, 750 F.2d at 983. In addition, the language surrounding the statements in issue "may signal that a specific statement which, standing alone, would appear to be factual is in actuality a statement of opinion." Ollman, 750 F.2d at 982. The focus of inquiry here is more properly on what is being said in addition to the alleged defamatory remarks rather than only upon who is making the comment in order to judge the context in which they are presented.

The column in which the statements in this care appeared is entitled, "It's Time The People Judge The Court." This title clearly calls for the readers/voters to opine and render a decision about the supreme court. The column then goes on to convey "[w]hat others say" about the Republican candidates for the court and "[w]hat others say about the Ohio Supreme Court." "What

others say" certainly puts a reader on notice that what is to follow is likely to be the opinion of others. The lead in paragraph to the statements in issue sets forth how others described the court: "'The Ohio Supreme Court . . . is the crudest, most partisan, most vindictive in memory, and the most dangerous. . . .'" Clearly opinion. The alleged defamatory language that follows, "It's no wonder that some are calling Ohio's Justice System the 'MAFIA FAMILY' Court," conveys the subjective belief others have drawn from the characteristics attributed to the court. The statement analogizes Ohio's justice system to a mafia operation, i.e., intimidating, vindictive, behind-the-scenes, etc, and capitalizes upon the Italian surnames to bolster the analogy. When read in context, it is apparent that no factual assertions of mafia connections were being made or implied but rather only hyperbolic opinions describing attitudes about the operation or style of the court.

The last factor to consider is the broader context of the statements since certain types of writings by custom or convention alert the reader that what is being read is more likely to be opinion and not fact. Ollman, 750 F.2d at 983; Scott, 25 Ohio St. 3d at 253; see, e.g., National Rifle Association v. Dayton News-

papers, Inc. (S.D. Ohio 1983), 555 F. Supp. 1299 (editorial). The statements in this case, as recognized by the trial court, were composed for a political campaign brochure. The pamphlet was distributed prior to an election which had already generated a great amount of controversy and concern, in part due to the feuding between the Ohio supreme court and the Ohio State Bar Association. The purpose of the brochure was to promote the election of Republican candidates and defeat the election of Democrat nominees. It could hardly be expected that any Democrat candidates would be glorified within the pages of a pamphlet urging the election of Republicans and published by the local Republican party. Similarly, any Republican candidate for office would not expect fair representation in a publican distributed by the Democrat party. Readers should expect rampant partisan opinion, puffery and bias in such one-sided vehicles of communication. The fact that the campaign brochure was authored by a prominent Republican and disseminated by the Committee only

heightens the expectation of partial political hyperbole rather than diminishing it as the trial court concluded.[6]

Based upon the totality of circumstances it is our view that Netzley's and the Committee's statements were expressions of opinion and therefore entitled to protection under the Constitution and the Ohio Constitution. Accordingly, these assignments or error are sustained.

B.

Netzley's and the Committee's second assigned errors are respectively that:

> THE TRIAL COURT ERRED IN INTERPRETING AND APPLYING THE "INNOCENT CONSTRUCTION" RULE AND IN DENYING APPELLANT THE DEFENSE ACCORDED TO WORDS THAT ARE SUSCEPTIBLE TO AN "INNOCENT CONSTRUCTION."
>
> THE TRIAL COURT ERRED IN DETERMINING THAT THE STATEMENTS WERE DEFAMATORY AS A MATTER OF LAW RATHER THAN SUBJECT TO AN INNOCENT CONSTRUCTION.

---

[6] This Court, of course, is not condoning all statements in political literature. As the court stated in Ollman, "[w]hile such a rule would have the advantage of simplicity and clarity, it could too readily become a license to libel." 750 F.2d at 987, n. 33.

The "innocent construction" rule provides that "if allegedly defamatory words are susceptible to two meanings, one defamatory and one innocent, the defamatory meaning should be rejected, and the innocent meaning adopted." Yeager v. Local Union 20 (1983), 6 Ohio St. 3d 369, 372, 453 N.E.2d 666. Words should be given their plain and ordinary meaning when evaluating them and should be read in context of the whole in which they were reported, rather than in isolation. England v. Automatic Canteen Company of America (6th Cir. 1965), 349 F.2d 989, 991 see Smith v. Huntington Publishing Co. (S.D. Ohio 1975), 410 F. Supp. 1270, aff'd (6th Cir. 1976), 535 F.2d 1255.

After reviewing the alleged defamatory words in this case, we believe they are not susceptible of an innocent construction. Although the word "Mafia" has more than one definition, see, e.g., Random House Dictionary 1155 (2d ed. 1987), we agree that the common meaning would be the criminal organization. The paragraph could thus be construed as implicating an association between the Celebrezze family and the criminal underworld organization. No innocent construction is apparent. Accordingly, these assignments or error are overruled.

C.

Netzley's and the Committee's third assigned errors are respectively that:

> THE TRIAL COURT ERRED IN FAILING TO HOLD THAT APPELLANT'S STATEMENT IS NEITHER LIBELOUS PER SE NOR PER QUOD.
>
> THE TRIAL COURT ERRED IN FAILING TO HOLD THE APPELLANT'S STATEMENT IS NEITHER LIBELOUS PER SE NOR PER QUOD.

The common law distinctions between libel per se and libel per quod have become virtually irrelevant in libel actions brought by public officials. What must be proven by a public official plaintiff in a libel suit is clear, i.e., that, by clear and convincing evidence, the alleged defamatory statement was made with actual malice. New York Times Co. v. Sullivan (1964), 376 U.S. 254; Dupler v. Mansfield Journal Co., Inc. (1980), 64 Ohio St. 2d 116, 413 N.E.2d 1187, cert. denied (1981), 452 U.S. 962. Liability without proof of fault is no longer available to a public official plaintiff in light of the actual malice standard of proof. The trial court applied the proper standard and did not err by failing to rule with respect to the common law distinctions. Accordingly, these assignments of error are overruled.

D.

Netzley's fourth and last assigned error is that:

THE TRIAL COURT ERRED IN FAILING TO HOLD THAT APPELLANT IS NOT SUBJECT TO AN INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS ACTION OR IS ABSOLUTELY IMMUNE THEREFROM.

Subsequent to the trial court's decision in this case, the United States Supreme Court held that "public officials may not recover for the tort of intentional infliction of emotional distress by reason of [offensive] publications . . . without showing in addition that the publication contains a false statement of fact which was made with 'actual malice,' i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true." Hustler Magazine v. Falwell (1988), 108 S. Ct. 876, 882; see Stepien v. Franklin (Apr. 28, 1988), Cuyahoga App. No. 52437 (Falwell applied to public figure). In order to recover for the intentional infliction of emotional distress, cross-appellee is required to demonstrate first that the publication contains a false statement of fact. Since Netzley's and the Committee's publication contained expressions of opinion and not statements of fact, see supra our disposition of Netzley's and the Committee's first assignments of error, cross-appellee's action for

the intentional infliction of emotional distress must fail. Accordingly, this assignment of error is sustained.

III. Celebrezze Appeal

A.

The trial court granted summary judgment in favor of Plain Dealer and Sharkey based on the privilege of neutral reportage. Therefore, we will first address appellant's second assigned error which is that:

> THE REPUBLICATION BY DEFENDANTS SHARKEY AND PLAIN DEALER IS NOT PROTECTED BY THE DOCTRINE OF "NEUTRAL REPORTAGE."

Initially, since the statements herein have been determined to be nonactionable expressions of opinion, see supra our disposition of Netzley's and the Committee's first assignments of error, no liability may arise for their accurate republican by Plain Dealer and Sharkey. Even if the statements were not protected opinion, the republication of those statements would be protected by the privilege of neutral reportage as determined by the trial court.

The privilege of neutral reportage permits the accurate and disinterested reporting of newsworthy accusations without regard to the republisher's views toward their validity. Edwards v. National Audubon Society, Inc. (2d Cir.), cert. denied sub nom. (1977), Edwards v. New York Times Co., 434 U.S. 1002; see Grafton v. American Broadcasting Co. (1980), 70 Ohio App. 2d 205, 215, 435 N.E.2d 1131. The privilege cannot be relied upon, however, if the republisher "espouses or concurs in the charges made by others, or . . . deliberately distorts [the] statements to launch a personal attack of his own on a public figure. . . ." Edwards, 556 F.2d at 120.

There is no question that the statements herein were newsworthy. The State Democratic Party Chairman, James Ruvolo, complained about the brochure to Plain Dealer both before and after the November election and indicated he was considering filing a complaint with the elections commission. Mr. Ruvolo also commented on the brochure on a Columbus television show after the election. Attorney General Anthony Celebrezze, Jr. gave a copy of the brochure to Sharkey during a post-election interview and indicated he thought it was libelous. In addition to the controversy generated by the brochure itself, there was the

ongoing tension between the Ohio supreme court and the Ohio State Bar Association. Therefore, it was also newsworthy that the then president of the Bar Association sought an apology from Netzley and the Committee for the brochure's critical paragraph.

Prior to publishing the articles in question, Sharkey, with the assistance of Joseph Rice, then Acting State Editor, thoroughly investigated the story behind the brochure. Sharkey spoke with the Bar Association's public relations' officer and obtained a copy of a letter written by the Association's president to Netzley requesting an apology to the Celebrezzes and Angelo Gagliardo. Sharkey also spoke with Netzley for his comments. Rice contacted former Chief Justice Celebrezze and discussed his comments.

After reviewing the evidence, we reach the same conclusion as the trial court, i.e., that the controversy over the brochure was fairly and accurately reported. Although the headline "GOP boss firm on court-Mafia tie" could have been phrased to more accurately reflect the story beneath, the headline cannot be read in isolation but must be read in context with the story it represents. The article itself contained quotes from the brochure and several quotes from those interviewed, including the Chief Justice's denial

of any Mafia association. No evidence was presented demonstrating that Plain Dealer or Sharkey concurred in the statements made or deliberately distorted the statements to personally attack appellant.

The principles embodied in the first amendment are too precious to give way under the circumstances in this case. We agree with the United States Court of Appeals for the Second Circuit when it stated that:

> [T]he interest of a public figure in the purity of his reputation cannot be allowed to obstruct that vital pulse of ideas and intelligence on which an informed and self-governing people depend. It is unfortunate that the exercise of liberties so precious as freedom of speech and of the press may sometimes do harm that the state is powerless to recompense: but this is the price that must be paid for the blessings of a democratic way of life.

Edwards, 556 F.2 at 122. Accordingly, this assignment of error is overruled.

B.

Appellant's first assigned error is that:

> THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR DEFENDANT'S SHARKEY AND PLAIN DEALER WHEN THE PLAINTIFF PRESENTED SOME EVIDENCE OF ACTUAL MALICE.

Appellant contends that he presented sufficient evidence of actual malice to withstand summary judgment against him, specifically that Plain Dealer and Sharkey had knowledge of the falsity of the statements in the brochure prior to republishing them. The trial court, however, made no determination on this particular issue since it relied upon the privilege of neutral reportage in granting summary judgment in favor of appellees. Since we are affirming the trial court's judgment on that basis, we, too, need not reach the actual malice issue. Accordingly, this assignment of error is overruled.

Appellant's las assigned error is that:

> THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS SHARKEY AND PLAIN DEALER ON THE PLAINTIFF'S CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

This assignment of error is overruled in accordance with our disposition supra of Netzley's and the Committee's first assignments of error and Netzley's last assignment of error.

The judgment of the trial court with respect to Plain Dealer and Sharkey is affirmed; the judgment of the trial court with respect to Netzley and the Committee is reversed and judgment is hereby rendered in favor of Netzley and the Committee.

This judgment is affirmed with respect to Plain Dealer and Sharkey; the judgment is reversed with respect to Netzley and the Committee and judgment is hereby rendered in favor of Netzley and the Committee.

Costs to appellant/cross-appellee Celebrezze.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

COOK, J., CONCURS.
(Judge Robert E. Cook of the Eleventh Appellate District, Sitting by Assignment.)

HOFSTETTER, J., CONCURS IN PART AND DISSENTS IN PART.
(See Attached Concurring and Dissenting Opinion.)
(Judge Edwin T. Hofstetter, Retired, of the Eleventh Appellate District, Sitting by Assignment.)

/s/ Saul G. Stillman
PRESIDING JUDGE
SAUL G. STILLMAN
(Retired, of the Eighth Appellate District,

Sitting by Assignment.)

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Then (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

James P. Celebrezze, Plaintiff-Appellant Cross-Appellee	:	Case Nos. 53864 and 53865
v.	:	CONCURRING AND
Robert E. Netzley et al., Defendant-Appellees Cross-Appellants	:	DISSENTING OPINION

HOFSTETTER, J., CONCURRING IN PART AND DISSENTING IN PART:

I concur with the opinion and judgment as it concerns the appeal of plaintiff-appellant James P. Celebrezze. Civ. R. 54(B), as used by the trial court, clearly makes the order granting summary judgment against Celebrezze final and appealable.

On the other hand, that same Civ. R. 54(B) language, in the instant case, does not make the denial of summary judgment to defendants Robert E. Netzley and the Miami County Republican Committee appealable, and remand is necessary for completion of the case in the trial court.

I do not believe that the opinion of the majority in the instant case comports with the Ohio law either pursuant to the Civil Rules or decisionally. The majority has relied heavily on Humphry v. Riverside Methodist Hospital (1986), 22 Ohio St. 3d 94, 488 N.E.2d 877, Amato v. General Motors Corp. (1981), 67 Ohio St. 2d 253, 423 N.E.2d 452, and Tilberry v. Body (1986), 24 Ohio St. 3d 117, 493 N.E.2d 954 for support. I have no quarrel with those decisions as applied to those cases. The facts of the instant care, however, do not, in my opinion, warrant the determination of finality for purposes of appeal as held by the majority.

Both Humphry and Amato, supra, as well as Tilberry stated, in effect, that the court must weigh "the harm to the 'prompt and orderly disposition of litigation' and the consequent waste of judicial resources resulting from the allowance of an appeal, with the need for immediate review because appeal after final judgment is not practicable."

Under the facts of this case, what would be the impracticability of appeal after final judgment, and what is the "substantial right" affected herein that could not await the finality of the proceedings in the trial court in the usual manner?

As I indicated earlier, I have no problem with Humphry, Amato or Tilberry supra as applied to their situations.

Humphry involved whether the disclosure of doctor-patient confidences of non-litigant parties should be allowed. An order as consequential, and possibly detrimental, as that certainly affects a substantial right and should be considered final for purposes of appeal.

Similarly, the significance of an order, as in Amato, determining that an action be maintained as a "class action" was, in the language of Justice Holmes, based on the facts therein, a special proceeding resolved through a balancing test, as follows: "This test weighs the harm to the 'prompt and orderly disposition of litigation,' and the consequent waste of judicial resources, resulting from the allowance of an appeal, with the need for immediate review because appeal after final judgment is not practicable."

In Tilberry, the trial court ordered a dissolution of a partnership in accordance with dissolution terms set forth in R.C. 1775.31(A) rather than pursuant to the partnership agreement. That order of dissolution, therefore, constituted a special proceeding not contemplated by the parties to the partnership. Such

an order, if permitted to stand without the availability of appeal because of lack of finality until the winding-up, accounting, and distribution were completed, could have disastrous effects. The Supreme Court held that such result affects the substantial rights of the parties, and an appeal after normal final judgment would not be practicable.

None of the indicia in the above cited cases, and on which the Supreme Court bottomed its judgments of finality for purposes of appeal, exists in the instant case. There is, in my opinion, absolutely no justification herein for abandoning either the Civil Rule as to finality, or finding that the denial of summary judgment to the cross-appellants falls within the statutory definition of final order in R.C. 2505.02. I would dismiss the cross-appeal of both Netzley and the Miami County Republican Committee, and remand the matter for further proceedings as to them.

With regard to the merits of the opinion of the majority, I have some disagreement. To the extent the majority of this court differs with the trial court in some of its factual conclusions on some issues, the basis for summary judgment under Civ. R. 56 is severely strained. I do concur with the majority that expressions of opinion are afforded absolute immunity. When, however, a

fact question exists as to whether certain statements are facts or opinion, and the answer to the question differs between the trial court and the majority herein, it is imperative that resolution of this difference should occur first in the trial court, subject to appeal as with any other summary judgment.

I concur in the judgment as it concerns plaintiff-appellant Celebrezze.

I would dismiss for lack of a final appealable order as to the cross-appellants.

BEST AVAILABLE

It's Time The People Judge The Court

For the Good of Ohio Elect

Andrew Douglas

and

Craig Wright

For Justices for Ohio Supreme Court.

What others say:

"Judge Douglas has been praised for fairness even by parties. . .he has ruled against. . . ." "Energetic and brilliant, he has legal skills, the guts to stand up for people. . . ."

Dayton Daily News 10-7-84

Judge Wright is "brilliant. . . ." "If I've got a client who's getting ripped off. . . . I want him in Craig's court."

Dayton Daily News 10-7-84

Ohio's Disgrace

What others say about the Ohio Supreme Court:

"The Ohio Supreme Court now being administered by Chief Justice Frank Celebrezze and his cronies is the crudest, most partisan, most vindictive in memory, and the most dangerous. . . ." "Only the voters of Ohio can stop it."

Dayton Daily News 10-7-84

It's no wonder that some are calling Ohio's Justice System the "MAFIA FAMILY" Court. Take a look. Frank Celebrezze, Chief Justice. Brother Jimmy Celebrezze, Associate Justice. Cousin Tony Celebrezze, Ohio Attorney General, and Frank Celebrezze's, "crony" Angelo Gagliardi, the intimidator in charge of the Ohio Disciplinary Council.

ONLY THE VOTERS OF OHIO CAN STOP THEM

VOTE DOUGLAS and WRIGHT

Paid for by Miami County Republican Committee
Robert E. Netzley, Chairman • Dawn Uhler

X	For President RONALD REAGAN For Vice President GEORGE BUSH
X	For Representative to Congress (8th District) THOMAS N. KINDNESS
X	For State Representative (58th District) ROBERT E. NETZLEY
X	For County Commissioner (Term Commencing January 2, 1985) DON HART
X	For County Commissioner (Term Commencing January 3, 1985) RICHARD J. GRAEF
X	For Prosecuting Attorney JEFFREY M. WELBAUM
X	For Clerk of Court of Common Pleas JAN A. MOTTINGER
X	For Sheriff LUTHER B. DUNFEE
X	For County Recorder JANET E. CAIN
X	For County Treasurer ETHEL FELVER
X	For County Engineer DOUGLAS L. CHRISTIAN
X	For Coroner WALTER B. MEEKER
X	For State Board of Education (8th District) SALLY R. SOUTHARD
	NON-PARTISAN JUDICIAL BALLOT
X	For Justice of the Ohio Supreme Court (Term Commencing January 1, 1985) ANDREW DOUGLAS
X	For Justice of the Ohio Supreme Court (Term Commencing January 2, 1985) CRAIG WRIGHT
X	For Judge of the Court of Appeals (2nd District) (Term Commencing February 9, 1985) HERMAN J. WEBER
X	For Judge of the Court of Common Pleas (Term Commencing February 9, 1985) JAMES J. HOOPER
X	For Judge of the Court of Common Pleas Probate and Juvenile Division (Term Commencing February 9, 1985) RICHARD A. GUATEN

Responsible Money Management Steady Progress

RICHARD J. GRAEF

DON HART

RE-ELECT Miami County Commissioners

JAN A. MOTTINGER

RE-ELECT
Clerk of Courts

Miami Counties can be proud. Miami County has shown steady progress and the honest responsible management of your tax dollars.

Miami Counties progress is highlighted by the construction of a new Safety Building and Jail, one of the finest Health Care Centers in Ohio (for the elderly and indigent), completed a new Animal Shelter, and a new County Garage. The 1975 Silver Bridge Study showed Miami County to have the best highway and bridge system in the State.

The old and beautiful Court House has been modernized and restored and the old County Home has been completely renovated for Social Service Offices. "That's steady progress." All this accomplished without any increase in taxes.

More important, hundreds of new jobs have been created in the Miami County Industrial Park.

Miami County is solvent and pays its bills promptly.

Miami County provides steady and efficient County Government, based on responsible money management.

Return our present County Commissioners and Clerk of Courts to County office.

A52

"AMERICA IS ON HER WAY BACK"

but we need

FOUR MORE YEARS

Leadership you can trust!

With President Reagan's leadership America's new strength and sense of purpose will carry hope and opportunity to all Americans and to all people thoughout the free world.

REAGAN BUSH'84

The Choice is clear. . .

We could return to the failed policies of Carter-Mondale of four years ago. You remember. We had escalating taxes, runaway inflation that riddled the family budget, devastating interest rates and a deteriorating economy with growing unemployment and plant closings. Remember? Carter-Mondale said the American People were infected with a malaise, a sickness of spirit.

In 1980, Ronald Reagan said "no", the American People do not suffer from a sickness of spirit. And in November 1980, the American people said "yes", there is a sickness in the land, but it's not us, it's Carter-Mondale; whose policies of the past, of hopelessness and self-blame are the source of the infection. The American people elected President Reagan.

In just four years, under President Reagan's leadership, Americans achieved the strongest sustained economic expansion in 35 years. Inflation has been drastically reduced, interest rates are down, and if reelected they will be reduced even further. Your income taxes have been cut. In foreign affairs, he has kept the peace and stopped the spread of Russian-Cuban aggression and expansion in Central and South America and in Europe.

We need Reagan's leadership! First, we need to continue the expansion of economic growth with more and better jobs and higher productivity. Second, he has kept the peace and seeks a genuine and verifiable arms control agreement. Finally, he has further strengthened the traditional values of faith, family, work and [illegible]. Proven leadership you know you can trust. Reelect President Ronald Reagan. Your choice is

We Need Tom Kindness in Congress and so does President Reagan

Re-Elect

THOMAS N. KINDNESS

for

Representative to Congress

Tom is a leader in fighting the waste and the excessive spending of "Tip" O'Neil. The growing national debt can only be reduced by courageous and responsible representation in Congress. Tom Kindness works for all of us.

We Need Bob Netzley in Columbus

Re-Elect

ROBERT E. NETZLEY

for

State Representative

Bob Netzley fights for you. He has received the Watchdog of the Treasury Award repeatedly from the Ohio Conservative Union for fighting waste of your tax dollars and excessive spending. Re-elect Bob Netzley, Defender of the Taxpayer.

It is legal for you to take this list of Republican candidates to the polls for reference on Election Day.

BLE COPY

It's time The People

Responsible

GOP boss firm on court-Mafia tie

By MARY ANNE SHARKEY
PD BUREAU

COLUMBUS — State Rep. Robert E. Netzley, chairman of the Miami County Republican Party, said yesterday he is not backing down from his organization's election brochure which said Ohio's justice system is run by the "Mafia family."

The brochure, mailed to Miami County Republicans before the Nov. 8 election, said:

"It's no wonder that some are calling Ohio's Justice System the 'MAFIA FAMILY' Court. Take a look. Frank Celebrezze, Chief Justice. Brother Jimmy Celebrezze, Associate Justice. Cousin Tony Celebrezze, Ohio Attorney General, and Frank Celebrezze's 'crony' Angelo Gagliardo, the intimidator in charge of the Ohio Disciplinary Counsel."

Democrats James Celebrezze and Cuyahoga County Common Pleas Judge John E. Corrigan lost to Republicans Craig Wright, a Franklin County Common Pleas judge, and Appeals Judge Andy Douglas of Toledo, respectively Nov. 8.

In a letter, Frank E. Bazler, president of the Ohio State Bar Association and a Miami County Republican, called on Netzley and the Miami County Republican Party to apologize to the Celebrezzes and Gagliardo.

"Frankly, I am appalled by that paragraph and deplore the poor judgment in its unacceptable use," Bazler wrote.

Netzley, R-48, of Laura, yesterday rejected Bazler's demand for an apology.

"I'm not apologizing to that court, I tell you," he said. "That's the way we feel about the court and the whole system."

Asked who the "some" in the brochure referred to, Netzley said "A lot of people in Miami County feel that way."

Attorney General Anthony J. Celebrezze Jr. was dismayed by the brochure and said yesterday "as a lawyer, I feel it is libelous."

Chief Justice Frank D. Celebrezze said, "I thought that type of name-calling had gone out with the advent of the 20th century ... that was the type of advertising we had to contend with."

He said he does not know anyone in the Mafia.

Bazler's defense of the Celebrezze family pleased the chief justice.

"That was very gentlemanly of him," he said. "Things like this are the type of thing the bar association ought to be interested in."

Frank Celebrezze and Bazler are to meet Wednesday to discuss the two-year-old feud between the court and bar association. Celebrezze had previously refused requests to meet with bar officials.

Dennis Whalen, spokesman for the state bar, called the meeting "a positive development."

A53

EXHIBIT "C"

Netzley firm on Celebrezze-Mafia ad

By MARY ANNE SHARKEY
PD BUREAU

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In a letter, Frank E. Hasler, president of the Ohio State Bar Association and a Miami County Republican, called on Netzley and the Miami County Republican Party to apologize to the Celebrezzes and Gagliardo.

"Frankly, I am appalled by that paragraph and deplore the poor judgment in its inexcusable use," Hasler wrote.

Netzley, R-68, of Lacra, yesterday rejected Hasler's demand for an apology.

"I'm not apologizing to that court, I tell you," he said. "That's the way we feel about the court and the whole system."

Asked who the "some" in the brochure referred to, Netzley said "A lot of people in Miami County feel that way."

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JUDGMENT AND OPINION
OF THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO
(filed April 28, 1987)

IN THE COURT OF COMMON PLEAS
COUNTY OF CUYAHOGA

James P. Celebrezze,	)	Case Number 86740
	)	
Plaintiff	)	Judge Donald C. Nugent
	)	
-vs-	)	
	)	JUDGMENT AND OPINION
Robert E. Netzley, et al.	)	
	)	
Defendants	)	

The Defendants Robert E. Netzley, Miami County Republican Committee, Plain Dealer Publishing Co. and Mary Anne Sharkey, have moved this Court pursuant to Rule 56 of the Ohio Rules of Civil Procedure for judgment in their favor on the ground that there is no genuine issue as to any material fact and that they are entitled to judgment as a matter of law.

In support of this Motion, Defendants Robert E. Netzley and the Miami County Republican Committee rely upon the deposition of Robert E. Netzley given on September 16, 1985, a copy of the Brochure, a transcript of Plaintiff James P. Celebrezze's testimony, certain political definitions and numerous news articles.

In support of their Motion, Defendants Plain Dealer Publishing Co. and Mary Anne Sharkey rely upon the affidavits of Mary Anne Sharkey and Joseph D. Rice, as well as certain excerpts from the deposition of Defendant Netzley and eleven additional attached exhibits with Memorandum.

In response to all such Motions, Plaintiff, in addition to a Memorandum directed to each such Motion, also submitted in support of his response the depositions of Mary Anne Sharkey; Joseph D. Rice; Douglas F. Kramer; and Robert E. Netzley. The Brochure and certain newspaper articles were also submitted.

Plaintiff was an elected Associate Justice on the Ohio Supreme Court beginning January 11, 1983. Plaintiff was the Democratic nominee for that seat on the Supreme Court in the November, 1984 general election. His opponent was the Republican nominee. This race, as well as the other contested Supreme Court election between the Democratic and Republican nominees, generated a great amount of publicity.

Defendant Netzley, a Republican, is a member of the Ohio House of Representatives and has been for over 25 years. He is also Chairman of Defendant Executive Committee of the Miami County Republican Party, aka Miami County Republican Com-

mittee. As both Chairman of the Miami County Republican Committee and as State Representative for over 25 years, Defendant Netzley has become a well-known and influential individual in the political arena in the State of Ohio.

During the campaign and prior to the November, 1984 election, Defendant Netzley developed, designed and made the Brochure that contained the offending material on behalf of the Miami County Republican Committee. This Brochure was published and distributed through the mail to registered voters in Miami County, Ohio prior to the election. The offending portion of the Brochure states:

> "It's no wonder that some are calling Ohio's Justice System the 'MAFIA FAMILY' Court. Take a look. Frank Celebrezze, Chief Justice. Brother Jimmy Celebrezze, Ohio Attorney General, and Frank Celebrezze's 'crony' Angelo Gagliardi, the intimidator in charge of the Ohio Disciplinary Council."
>
> ONLY THE VOTERS CAN STOP THEM
>
> VOTE DOUGLAS and WRIGHT

Immediately upon the publication of the Brochure, criticism and controversy erupted throughout the Democratic Party, the Celebrezze family and Ohio State Bar Association.

Before the election, nothing was published in The Plain Dealer concerning the Brochure. However, Democratic State Party Chairman James Ruvolo told reporter/editor Joseph Rice that he found the Brochure offensive. After the election in which Plaintiff was defeated, Ruvolo again mentioned the Brochure to Rice and told him he was considering filing a complaint with the Ohio Elections Commission. Further, Mr. Ruvolo publicly mentioned the contents of the Brochure on a Columbus, Ohio television program on November 11, 1984, the election.

On November 15, 1984, Defendant Sharkey conducted an interview with Ohio Attorney General, Anthony J. Celebrezze, who gave Sharkey a copy of the Brochure and told her that he felt as an attorney, the Brochure was libelous.

Defendant Netzley claims the Brochure was only a condensed version of several statements and ideas that had previously been published in the editorial and feature pages of other newspapers and magazines.

Before The Plain Dealer decided to publish an article on the Brochure and the resulting controversy, Defendant Sharkey had talked to Joseph Rice on at least two occasions whereupon Rice had mentioned Ruvolo's comments. She had knowledge of

Ruvolo's TV appearance mentioning the Brochure; she had contacted Dennis Whalen, spokesman for the Ohio State Bar Association, to learn their position on the subject; she had reviewed a copy of the letter sent by the President of the Ohio State Bar Association and a member of the Miami County Republican Committee, Frank Bazler, to Defendant Netzley criticizing the Brochure and demanding an apology from Netzley; she personally contacted Defendant Netzley for his comments both about the Brochure and Bazler's demand for an apology; and, she was aware of the comments made to Joseph Rice by then Chief Justice Frank Celebrezze concerning the controversy, which comments were included in the article when Joseph Rice edited it for publication. The Plaintiff's Complaint, Count III, "False Light", having been dismissed by the Court on June 30, 1986, alleges that the publication of these various statements by the Defendants constituted libel, slander, and intentional infliction of emotional distress. Plaintiff's claim of invasion of privacy was previously dismissed at the request of the Plaintiff.

In Norris v. Ohio Std. Oil Co. (1982), 70 Ohio St. 2d 1, the Ohio Supreme Court held,

> Summary judgment is a procedural device to terminate litigation and to avoid a formal trial where there is nothing to try. It must be awarded with caution, resolving doubts and construing evidence against the moving party, and granted only when it appears from the evidentiary material that reasonable minds can reach only an adverse conclusion as to the party opposing the motion. Petroff v. Commercial Motor Freight, Inc. (1960), 82 Ohio Law Abs. 433; Horvath v. Fisher Foods, Inc. (1962), 93 Ohio Law Abs. 182; Ohio App. 2d 41; Morris v. First Natl. Bank & Trust Co. (1970), 21 Ohio St. 2d 25. A successful motion for summary judgment rests on the two- part foundation that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Kwait v. John David Management Co. (1974), 42 Ohio App. 2d 63; Vetovitz Bros., Inc. v. Kenny Constr. Co. (1978), 60 Ohio App. 2d 331, 332. (Emphasis added.)

See also, Viock v. Stowe-Woodward Co. (1983), 13 Ohio App. 3d 7. Therefore, before a reviewing court will sustain summary judgment, it must follow the standard set forth in Civ. R. 56(C), which specifically provides that before summary judgment may be granted, it must be determined that,

> (1) No genuine issue as to any material fact remains to be litigated: (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc. (1977), 50 Ohio St. 2d 317.

When fundamental First Amendment rights are at issue, the Ohio Court recognized the necessity of disposing of cases by way of summary judgment.

The Ohio Supreme Court stated in Dupler v. Mansfield Journal Co., 64 Ohio St. 2d 116 (1980), cert. denied, 452 U.S. 962 (1981):

> Summary procedures are especially appropriate in the First Amendment area . . . "Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide-open, for self-censorship affecting the whole public is 'hardly less virulent for being privately administered.'"

The United States Supreme Court as well states that in defamation cases, there are more stringent standards for Plaintiff to defeat a motion for summary judgment. See Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 54 U.S.L.W. 4755 (1986).

In Anderson, the Court reiterated that a defamation plaintiff must prove with "convincing clarity" that a genuine issue of material fact exists with respect to actual malice. The Court further held that the plaintiff must set forth "affirmative," "pro-

bative," "concrete evidence" to meet his burden of proof to defeat summary judgment.

The Anderson Court held:

> Respondents argue, however, that whatever may be true of the applicability of the "clear and convincing" standard at the summary judgment or directed verdict stage, the defendant should seldom if ever be granted summary judgment where his state of mind is at issue and the jury might disbelieve him or his witnesses as to this issue. They rely on Poller v. Columbia Broadcasting Co., 368 U.S. 464 (1962), for this proposition. We do not understand Poller, however, to hold that a plaintiff may defeat a defendant's properly supported motion for summary judgment in a conspiracy or libel case, for example, without offering any concrete evidence from which a reasonable juror could return a verdict in his favor and by merely asserting that the jury might, and legally could, disbelieve the defendant's denial of a conspiracy or of legal malice. The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict. Rule 56(e) itself provides that a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. Based on that Rule, Cities Service, 391 U.S., at 290, held that the plaintiff could not defeat the properly supported summary judgment motion of a defendant charged with a conspiracy without

> offering "any significant probative evidence tending to support the complaint." As we have recently said, "discredited testimony is not (normally) considered a sufficient basis for drawing a contrary conclusion." Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 512 (1984). Instead, the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff had had a full opportunity to conduct discovery.

54 U.S.L.W. at 4759-60.

The first issue to be resolved is whether the Plaintiff is a public figure as that term is defined in the prosecution of a libel suit. Plaintiff is a former Common Pleas Judge, Court of Appeals Judge, Ohio Supreme Court Associate Justice, and currently is law director for the City of Broadview Heights, and he has been a candidate for other public office.

The Supreme Court has held that certain individuals must meet a heightened burden (actual malice) before they can maintain a successful libel suit. The court has held that the First Amendment of the Federal Constitution requires two categories of individuals to meet this threshold, public officials and public figures. Gertz v. Robert Welch, Inc. (1974), 418 U.S. 323.

The Gertz court gave the following definition of a public figure:

> "The New York Times standard defines the level of constitutional protection appropriate to the context of defamation of a public person. Those, who by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures. . . ."

The court explained the rationale underlying this heightened standard:

> With that caveat we have no difficulty in distinguishing among defamation plaintiffs. The first remedy of any victim of defamation is self-help using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.
>
> More important than the likelihood that private individuals will lack effective opportunities for rebuttal, there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs.
>
> * * *

> Those classed as public figures stand in a similar position. Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part, those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.
>
> Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.
>
> Id. at 344, 345.

The Plaintiff, James P. Celebrezze, is a public figure. Having determined that Plaintiff is a public figure and before addressing the issue of "actual malice" and "neutral reportage," this Court must address the issue whether the Brochure was an expression of opinion or fact. Expressions of opinion in contrast

to statements of fact differ dramatically in their protection under the Constitution.

The Ohio Supreme Court has confirmed that opinions are not actionable when they form the basis for a defamation action. See Scott v. News Herald, 25 Ohio St. 3d 243 (1986). To distinguish expressions of opinion from statements of fact, the Ohio Supreme Court in Scott adopted the four-pronged "totality of the circumstances" test which had originally been set forth in Ollman v. Evans, 750 F. 2d 970 (D.C. Cir. 1984), cert. denied, 105 S. Ct. 2662 (1985).

The four-pronged test must be used to determine whether a statement is an expression of opinion or a statement of fact along with all other facts and circumstances that exist to determine the "totality of the circumstances."

> Consideration of the totality of the circumstances to ascertain whether a statement is opinion or fact involves at least four factors. The first is the specific language used, second whether the statement is verifiable, third is the general context of the statement, and fourth is the broader context in which the statement appeared. See generally, Ollman v. Evans, supra, at 979; Janklow v. Newsweek, Inc. (8th Cir. 1985), 759 F. 2d 644, 649.

In the first prong, the Court must look to the specific language:

> "It's no wonder that some are calling Ohio's Justice System the 'MAFIA FAMILY' Court."

The common meaning of Mafia Family is to refer to an organized criminal syndicate. The clear impact of this statement is to characterize Plaintiff as a member of an organization with a profound reputation of the most violent and illegal conduct. There is not an individual reading such a statement in connection with Plaintiff and the others with Italian names which would interpret it as anything but a statement of fact that Plaintiff and the others mentioned were members of or had very close ties to organized crime. This Court cannot say, as a matter of law, that such statement had multiple, ambiguous, indefinite, imprecise, and loosely definable meanings. Thus, the first prong of the Scott test has been established by clear and convincing evidence.

The second prong is the verifiability of the statement. Clearly from all the evidence, this statement is absolutely not verifiable. Thus, the prong of the Scott test has been established by clear and convincing evidence.

The third prong is the general context in which this statement was made. The column in which the statement was made con-

tained four paragraphs, of which the first three contained direct quotes from the Dayton Daily News and the last paragraph contained the complained-of statement. In this context it not only appears to be a statement of fact, but also is given more credibility by association with the Dayton Daily News. Also, the inclusion of other prominent public officials in the Ohio justice system with Italian last names militates in favor of a statement of fact rather than an expression of Thus, the third prong of the Scott test has been established by clear and convincing evidence.

The fourth prong is the broader context in which the statement appeared. There is no question that the Brochure was developed and distributed as a political campaign tool and in reference to this case, to defeat Plaintiff. Politicians use rhetoric during campaigns, and the social implications of a free exchange of ideas during political races are to be encouraged. However, when an official Brochure of the Miami County Republican Party is issued and Defendant Netzley is the prominent individual he is within the Republican Party and Chairman of the Executive Committee of the Miami County Republican Committee, the statement certainly under all of these circumstances can be considered one of fact rather than an expression of opinion. Thus,

the fourth prong of the Scott test has been established by clear and convincing evidence.

Having determined that such statement was a statement of fact, it next be determined whether the statement was in fact defamatory or whether the statement is capable of or susceptible to an innocent "meaning or construction."

The second issue in this context to then be decided is whether the alleged defamatory statements are false, since truth is a complete defense to such action, O.R.C. 2739.02. The real question is whether the statement is substantially true rather than literally true in every respect. See, Driscoll v. Block, 3 Ohio App. 2d 351, 368-70 (Lucas County 1965); Horvath v. The Telegraph, 8 Media L. Rep. (BNA) 1657, 1661 (Ohio Lake County App. 1982).

In assessing the alleged defamation, it must be read in context. As to Defendants Netzley and the Miami County Republican Committee, the entire Brochure must be reviewed. As to Defendants Sharkey and Plain Dealer Publishing Co., the headline and the article must be read together. Painter v. E.W. Scripps Co., 104 Ohio App. 237 (Franklin County 1957)(syllabus 1).

The evidence before this Court conclusively demonstrates that Defendant Netzley knew that Plaintiff was not a member of the Mafia nor did he have any evidence whatsoever to even suggest any Mafia connection when he wrote and published the statement. Further, Defendants Sharkey and the Plain Dealer Publishing Co. knew not only that Defendants Netzley and the Miami County Republican Party had no evidence to substantiate their defamatory statement, but also that no such evidence existed to the knowledge of either Defendant Sharkey or Defendant Plain Dealer Publishing Co.

Defendants contend the "Innocent Construction Rule," e.g., that the defamatory statement is subject to an innocent, non-defamatory meaning as well as a defamatory meaning, thus making the statement non-actionable. See Yeager v. Local Union 20, 6 Ohio St. 3d 369 (1983). The Court stated, "[I]f defamatory words are susceptible to two meanings, one defamatory and one innocent, the defamatory meaning should be rejected and the innocent meaning adopted." Id. at 372.

The inclusion of the Ohio Attorney General in this so-called "Mafia Family Court" along with the Disciplinary Counsel, all with names of Italian heritage, make this statement impossible to

say that it is susceptible to two meanings, one innocent and one defamatory as a matter of law. This statement was clearly calculated to prey upon the most vile form of racial prejudice in implying that the elected Italian public officials named were members of the "Mafia," a well-known criminal organization which has historical roots within the Italian-American community. It is this characterization of criminality that Italian Americans have fought for years to overcome. This statement is not a term used in the political sense such as "Irish Mafia" and "Georgia Mafia" or "Magnolia Mafia" as were sometime terms used to imply political "cronyism" in the Kennedy and Carter Administrations.

This Court cannot say under the Yeager requirements that the defamatory words are, as a matter of law, susceptible to two meanings, one defamatory and one innocent. This statement in this case, as a matter of law, can only be construed as defamatory.

In order for a public official plaintiff like James Celebrezze to recover in a libel suit, he must prove that the defamatory statement was made "with actual malice, that is, with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times Co. v. Sullivan, 376 U.S. 254, 279-

80 (1964). The "actual malice" standard under the New York Times rule requires proof that the defendant published a statement with a "high degree of awareness of its probable falsity" and that the defendant "in fact entertained serious doubt as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1968); Garrison v. Louisiana, 379 U.S. 64, 74 (1964).

The court in Hunt v. Liberty Lobby, 720 F. 2d 631 (11th Cir. 1983), acknowledged that the burden on a public official plaintiff is indeed a heavy one, and that, "absent an admission by the defendant that he knew his material was false or that he doubted its truth, a public figure must rely upon circumstantial evidence to prove his case." Id. at 643, citing Herbert v. Lando, 441 U.S. 153, 99 S. Ct. 1635 (1979).

As one distinguished libel author acknowledged,

> Although the New York Times (actual malice) standard is difficult for a plaintiff to meet, it is not insurmountable.
>
> No single factor is guaranteed to satisfy the standard in all cases, but in attempting to meet the test the plaintiff may rely upon evidence of negligence, of motive and of intent . . . for the purpose of establishing, by cumulation and by appropriate inferences, the requisite degree of culpability. Mere statements by the defendant of his belief in the truth of a publication will carry the

> day only if they are not overridden by evidence establishing knowing or 'reckless' falsity.

R. Sacks, Libel, Slander & Related Problems, 213-214 (1980).

Thus, although recklessness in a defamation case requires a showing of subjective doubt, it "is ordinarily inferred from objective facts." Washington Post Co. v. Keogh, 365 F. 2d 965, 968 (D.C. Cir. 1966), cert. denied, 385 U.S. 1011 (1967); Goldwater v. Ginzburg, 414 F. 2d 324 (2d Cir. 1969). The reasoning of the First Circuit in Bose Corp. v. Consumers Union of United States Inc., 692 F. 2d 189, 196 (1st Cir. 1982), aff'd _____ U.S. _____, 80 L. Ed. 2d 502 (1984) is instructive in this regard:

> The subjective determination of whether [a defendant] in fact entertains serious doubts as to the truth of the statement may be proved by inference, as it would be rare for a defendant to admit such doubts . . . A court typically will infer actual malice from objective facts - - - These facts should provide evidence of negligence, motive and intent such that an accumulation of the evidence and the appropriate inference supports the existence of actual malice. (Emphasis added.)

The Supreme Court in St. Amant, supra, at 732, has set forth certain circumstances, evidence of which will support a finding of actual malice:

> The defendant in a defamation action brought by a public official cannot, however, automatically ensure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on a" unverifiable anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports. (Emphasis added.)

Furthermore, when a subject is not so newsworthy as to be considered "hot news," "actual malice may be inferred when the investigation for a story . . . was grossly inadequate in the circumstances." Hunt, supra, citing with approval Vandenburg v. Newsweek, Inc., 441 F. 2d 378, 380 (5th Cir. 1971).

As previously stated, a public official may not recover in a libel action unless he proves with "convincing clarity" that the

article (as to Defendants Sharkey and Plain Dealer Publishing) or the Brochure (as to Defendants Netzley and Miami County Republican Committee) was published with actual malice, i.e., "with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times, supra, 258-286. This constitutional privilege was premised on a "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open . . . " Id. at 270.

To prove that there was reckless conduct, there must be sufficient evidence to permit the conclusion that the Defendant "in fact entertained serious doubts as to the truth of his publication." St. Amant, supra, at 731. And as has been previously stated as well, Plaintiff cannot defeat a motion for summary judgment without "concrete evidence" that could cause a jury to find actual malice with convincing clarity. See Anderson, supra.

A review of all the evidence before this Court, including Defendant Netzley's deposition, clearly demonstrates that there is a genuine issue to permit a jury to determine the existence of actual malice by Defendants Netzley and Miami County Republican Committee. The remaining Defendants will be addressed later on this issue.

Defendants Sharkey and Plain Dealer Publishing claim notwithstanding the defamatory nature of the Brochure, its republication is protected by the constitutional doctrine of neutral reportage and is thus not actionable.

This doctrine of "Neutral Reportage" first came into prominence in Edwards v. National Audobon Society, Inc., 556 F. 2d 113 (2d Cir.), cert. denied, 434 U.S. 1002 (1977). This decision discusses the need to permit a neutral report of an event of public interest. However, this does not mean to imply that a publication may report anything said by anyone under the guise of being constitutionally privileged by the neutral reportage doctrine. The court in Edwards set certain guidelines to be followed. In Edwards, the National Audubon Society made serious charges against a public figure that were reported by the media. Due to the prestige and standing of the National Audubon Society and the serious nature of the charges, the court found the reporting of such charges to be constitutionally protected. The court also made clear that this must be decided on a case-by-case basis.

Ohio has recognized and adopted the doctrine of "Neutral Reportage." See Horvath, supra; House of Wheat v. Wright, No. 8614, Slip Op. (Ohio Montgomery County App., Oct. 10, 1985);

J.V. Peters & Co. v. Knight Ridder Co., 10 Media L. Rep. (BNA) 1576, 1580-81 (Ohio Summit County App. 1984); and Grafton v. American Broadcasting Co., 70 Ohio App. 2d 205, 215.

The Plain Dealer and Sharkey had absolutely no evidence whatsoever of any alleged connection of the Plaintiff and the Mafia. They thoroughly investigated the Brochure and the persons responsible for it and accurately reported its contents with the resulting controversy without concurring in the charges made or espousing them to others. The Plain Dealer and Sharkey were not only reporting the publication of the Brochure, but also they were reporting or republishing the comments and complaints concerning the Brochure made by James Ruvulo and Ohio Attorney General Anthony J. Celebrezze. Clearly, the charges contained in the Brochure were unjust and without foundation, but when made by Defendant Netzley and the Miami County Republican Committee under these circumstances, to prohibit such republication would violate the public interest and the public right to such information.

Accordingly, and for the foregoing reasons, the Motion for Summary Judgment filed on behalf of the Defendants Robert E.

Netzley and the Miami County Republican Committee is overruled. The Motion for Summary Judgment filed on behalf of the Defendants Plain Dealer Publishing Company and Mary Anne Sharkey is granted. Pursuant to ORCP 54(B), this Court specifically intends to make such findings as to each Defendant a final judgment and makes the express determination that there is no just reason for delay.

/s/ Donald C. Nugent
DONALD C. NUGENT, JUDGE

DATED: /s/ April 28, 1987

SERVICE

A copy of the foregoing Judgment and Opinion was sent by ordinary U.S. Mail this /s/ 28th day of /s/ April, 1987, to:

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/s/ Donald C. Nugent
DONALD C. NUGENT, JUDGE

U.S. Const. amend. I:

Articles in addition to, and amendment of, the Constitution of the United States of America, proposed by Congress, and ratified by the legislatures of the several states pursuant to the Fifth Article of the original Constitution.

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jursidiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, whithout due processof law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the wholenumber of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such Staate, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion

which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator of Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

§2505.02 Final order.

An order that affects a substantial right in an action which in effect determines the action and prevents a judgment, an order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order that vacates or sets aside a judgment or grants a new trial is a final

order that may be reviewed, affirmed, modified, or reversed, with or without retrial.

When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon the request of either party, shall state in the order the grounds upon which the new trial is granted or the judgment vacated or set aside.